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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1217

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and PETER WEBER, WILLIAM DUFFY and JOHN PIERSON,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 825, AFL-CIO, PETER WEBER, its business manager,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and PETER WEBER, WILLIAM DUFFY and JOHN PIERSON,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 825, AFL-CIO, PETER WEBER, *its business manager,*

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Local 825, International Union of Operating Engineers, AFL-CIO respectfully prays that a Writ of Certiorari issue to review the opinion and decree of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on August 25, 1970 and October 8, 1970, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 430 F.2d 1225 and is reproduced in Appendix A to this Petition as is the judgment. The report and recommendations of the Special Master is reproduced in Appendix B to this Petition.

JURISDICTION

The opinion of the Court of Appeals was entered on August 25, 1970 and its decree on October 8, 1970. The jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether it is proper to adjudge a labor organization in civil contempt, for having engaged in past violations of a restraining order of a Court of Appeals.

STATUTE INVOLVED

This case involves Section 8(b)(4)(B) of the National Labor Relations Act as amended (61 Stat. 136 29 U.S.C. Section 151 *et seq.*). This section is reproduced as Appendix C hereto.

BACKGROUND

A. *Prior Decisions*

On October 22, 1963 and August 5, 1966, the United States Court of Appeals for the Third Circuit in its Dockets Nos. 14,318 and 15,928, respectively, entered decrees prohibiting the Petitioner from engaging in violations of Section 8(b)(4)(B) of the National Labor Relations Act as amended.

B. *Institution of Contempt Proceedings*

On November 24, 1967, the National Labor Relations Board petitioned the United States Court of Appeals for the Third Circuit to adjudge the Union in Civil Contempt for allegedly disobeying the two prior Court decrees on three past separate occasions. The Board's petition also requested the Court hold the Union and certain named individuals in criminal contempt for the alleged violations.

The Court, by Order to Show Cause, required that the Union file an Answer to the Petition and show cause why it should not be adjudged in civil contempt. The Union demanded a jury trial which was denied by the Court and contested the Court's jurisdiction. A Special Master was appointed by the Court to hear the case and to make his

report and findings. On November 13, 1968, the NLRB moved to amend its petition and alleged that the Union was in Civil contempt for violating the two decrees on a 4th occasion, namely, September 25, 1968. The Union again demanded a jury trial which the Court denied. The supplemental Petition was also referred to the Special Master for hearing and on December 2, 1969, he issued his report finding that the Union had violated the two decrees on the four occasions as alleged. The Union thereafter filed an Answer to the Master's report and the Court of Appeals in its decision affirmed the Master with respect to his findings that the Union was in civil contempt on three of the four occasions; the Court reversed the Master's findings with respect to the fourth occasion, and the Court affirmed all sanctions to be imposed as recommended by the Master.[1]

STATEMENT OF CASE

The three incidents involved occurred at separate construction sites. At the time the contempt petition and the supplemental petition were filed the Union was not engaging in any contemptous conduct. The alleged contemptous conduct had been concluded. In two of the incidents the Union had a prime dispute with a subcontractor (Morin Erection Co., herein Morin) and in the third incident, the Union's prime dispute was with the

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[1] The Judgment provides that the Union comply with the previous two decrees of the Court: post notices for a period of 60 days, mail notices to each of its members and to each employer with whom it has an agreement, and to read the contents of the notices at a membership meeting. In addition, the Judgment further provides that if the Union engages in future violations of the decrees, it will be fined $10,000 plus $1,000 a day for each day the future violation continues.

general contractor, S. S. Silberblatt, Inc. (herein Silberblatt). The incidents will be referred to herein as theay were in the Master's report and the Court's opinion.

A. *Office Building Construction at South Boundbrook, New Jersey*

Allen Brothers & O'Hara, was the general contractor at this job site to erect an office building. It subcontracted work to Volunteer Structures Co., who in turn subcontracted work to Morin. Morin in the performance of its duties rented a manned crane from United Crane and Shovel Service Co. A dispute arose with respect to Morin's failure to comply with area standards and employ a member of the Union on a welding machine. A work stoppage occurred and the Union engaged in picketing Morin at the premises. The Master and the Court found that the Union induced employees of the crane rental company and the general contractor to refuse to work and that the Union coerced those employers.

B. *Essex County Court House Construction at Newark, New Jersey*

Silberblatt was the general contractor at this job site and subcontracted the excavation work to Petillo Brothers. A dispute arose between the Union and Silberblatt because of the latter's alleged refusal to abide by its collective bargaining agreement with the Union. Petillo's employees refused to perform work and, Petillo itself, at the request of the Union, refused to permit its employees to perform work. The Master and the Court found that the Union coerced Petillo to refrain from working and induced its employees to refuse to work.

C. *Royal Lubricant Construction Site at Hanover*

Becker Construction Co. was the general contractor at this job site. It subcontracted its steel decking work to Nicholas J. Bouras Inc. who in turn subcontracted the work to Morin. Becker hired a manned crane from Hermes & Young, a crane rental company. A dispute arose on the job with respect to Morin's failure to employ a member of the Union on a welding machine. Hermes and Youngs' employees refused to work and the Master and Court found that the Union induced employees of Hermes and Young to strike and coerced Becker Construction Company.

In each of the incidents the Master and the Court found that the Union had engaged in illegal conduct for an illegal objective within the meaning of the statute.

FINDINGS OF THE MASTER AND THE COURT BELOW

The Master refused to consider the Union's argument that a civil contempt proceeding under the circumstances was inappropriate. It was his opinion that this issue was not a matter referred to him for consideration.

With respect to the Union's argument that the alleged wrongs could not constitute a civil contempt because the episodes were concluded prior to the institution of the proceedings, the Court held:

> "... Whether this contention might have merit where a single act of contumacy has been charged, we need not and do not decide. In this case unlawful secondary boycotting of the kind prohibited by our decrees is said to have occurred on four occasions involving

> different neutral employers and employees. Indeed, two of these episodes are alleged to have occurred after a rule to show cause had issued on the present contempt citation and were added to the wrongs charged in this proceeding on petition of the Board. If such repeated violations of particular prohibitory decrees of this court have occurred, a civil proceeding is appropriate to determine whether the misconduct amounted to contempt and, if so, what civil sanctions are appropriate and reasonably calculated to cause the union to abandon a course of intermittent flouting of our decrees whenever such misconduct may seem to serve its purposes. . ."

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

There is probably no area of law subject to the multiple confusion as exists in the area of contempt. Courts have misconstrued the purpose of civil and criminal contempt and have ordered remedies inapplicable to the particular contempt before it. Such confusion and wrongful characterizations is not readily understandable in view of the clearcut decision of the United States Supreme Court in *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418.

That case is the leading case dealing with the subject matter of contempt and sets forth in specific details the law applicable to contempt be it civil or criminal. In that case the defendants had been found to have violated a restraining order and at the time of the contempt proceeding they were not presently in violation of the order.

They were sentenced to prison terms and upon appeal to the Supreme Court it was necessary for the Court to determine whether or not the prison sentences were proper. To reach that conclusion, the Court was forced to determine the nature of the proceeding. It eventually decided that the proceeding sounded in civil contempt and that the jail sentences were therefore improper.

The Court in determining the characteristics of civil and criminal contempt stated that the line to be drawn was tenuous. However, it further stated that it was not the fact of punishment but rather its characteristics and purpose that serves to distinguish between the two types of contempt.

If there is a civil contempt the punishment is remedial and for the benefit of the complaining party. If it is for criminal contempt, the sentence is punitive and to vindicate the authority of the Court. For example, if a defendant is ordered by the Court to perform an affirmative act and he refuses, he may be imprisoned. The imprisonment in such a case is not a punishment, but rather is intended to be remedial to coerce the defendant to do what he had been ordered to do. The same is true if a defendant refuses to pay alimony. The order of imprisonment or a fine in that type of a case is not to vindicate the Court's authority, but rather is to force a defendant to perform an act. As is stated in the case of *In re Nevitt*, 117 Fed. Rep. 451, the defendant in a civil contempt matter "carries the keys of his prison in his own pocket." He can at any time end his sentence and discharge himself by doing what he had previously refused to do.

The Court distinguished that which a defendant is ordered to do and that which the defendant is commanded not to do. In the latter case, the disobedience is a thing

already accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. Imprisonment in that case does not operate as a remedy, coercive in nature to force compliance, but rather as a punishment for the completed acts of disobedience. The Court stated that this distinction is sound in principal and generally, if not universally, affords a test to determine the characteristic of the punishment. The contempt in that case, as is stated above, did not constitute the defendant's refusing to do an act required but rather doing what had been prohibited.

The Court held the only possible remedial relief for such disobedience would have been to impose a fine for the use of the complaining party measured in some degree by the monetary injury caused by the act of disobedience. In Federal Courts damages in a civil contempt proceeding are purely compensatory. The fine imposed cannot exceed the actual loss to the complaining party caused by the contemptous conduct. *Parker v. U.S.*, (CA 1), 153 F.2d 66; *Sunbeam Corp. v. Golden Rule Appliance Co.*, (CA 2), 252 F.2d 467.

In the instant case, the NLRB did not contend that it lost any money as a result of the alleged contemptous conduct. It did not offer proof of damages lost and it was not contended by them that compensatory damages be awarded, other than legal costs.

The Courts have, in accordance with the ruling in the *Gompers* case, distinguished between a mandatory injunction, requiring the defendants to refrain from engaging in certain conduct and an affirmative order. It has been held that if a restraining injunction is violated, imprisonment or

punishment for contempt will not serve to redress the plaintiff's injury and Courts have concluded that the violation of restraining injunctions must constitute a criminal contempt: *Michaelson v. United States*, 266 U.S. 44 (1924); *Reeder v. Morton-Gregson Co.*, 298 Fed. 785 (C.C.A. 8th, 1924); *Pino v. United States*, 278 Fed. 479 (C.C.A. 7th, 1921); *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 157 Fed. 809 (C.C.N.D. Calif. 1909); *Ex parte Hill*, 229, Ala. 501, 158 So. 531 (1935); *Kelly v. Montebello Park*, 141 Md. 194, 118 (Atl. 600) 1922; *Limerick v. Riback*, 204 Mo. Appl. 321, 324 S.W. 45 (1920); *Chicago, B. & Q. R. Co. v. Calderleeve*, 165 Mo. App. 370, 147 S.W. 836 (1912); *Phillips v. Welch*, 11 Nev. 187 (1876); *Staley v. South Jersey Realty Co.*, 83 N.J. Eq. 300, 90 Atl. 1042 (Err. & App. 1914); *State v. Knight*, 3 S.Dak. 509, 54 N.W. 412 (1893); *In re Whitmore*, 9 Utah 441, 35 Pac. 524 (1894); see *People ex rel, Dougherty v. Yarowsky*, 236 Mich. 169, 171-172, 210 N.W. 246, at 247 (1926); *Department of Health of New Jersey v. Borough of Ft. Lee*, 108 N.J. Eq. 139, at 141, 154 Atl. 319 at 320 (CH. 1931); *Oakland Coal Co. v. Wilson*, 196 Ind. 501, 149 N.E. 54 (1925).[2]

Since the purpose of civil contempt is remedial and not to punish it is a requisite that a defendant have the ability to purge himself of the contempt. The ruling of *Nevitt* is an axiom throughout the study of the law of contempt. The defendant carries the keys to the jail in his pocket. Accordingly, in a civil contempt proceeding a fixed term of a jail sentence is improper because it obviates and makes illusory the ability to purge. The U. S. Supreme

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[2] See also *Boylan v. Detrio* (CA 5) 187, F. 2d 375; *U.S. v. Bittner*, (CA 4), 11 F. 2d 39; *U.S. v. Goldman*, 277 U.S. 299; *Parker v. U.S. supra; N.J. Zinc v. Loca 890 Mineworkers*, Supreme Court of New Mexico, 261 Pac Rep. 2d 648, *Stewart v. U.S.* (CA) 236 F. 838.

Court in *Schillitani v. U. S. of America*, 384 U.S. 364, recently had occasion to restate the theory of the *Gompers* case and to discuss these issues.

In that case the defendant refused to answer questions before a Grand Jury. He was fined and found guilty of criminal contempt. The sentence was conditional in that he received two years imprisonment, however, he had the absolute right to be released upon compliance ie: answering the questions.

The matter was appealed to the Supreme Court and the Supreme Court held that notwithstanding the characterization of criminal contempt, the matter was really civil contempt in view of the conditional sentence that was imposed. The Court further stated that the punishment imposed in that case was not punitive, but rather that its purpose was to coerce compliance. In reaching the issue the Court cited the *Gompers* case and held that the distinction in a civil or criminal contempt proceeding was based upon the nature of the disobedience and the characteristic of the punishment. In that case, the act of disobedience constituted a refusal to do what had been ordered and not in doing what had been prohibited and since the judgment imposed conditional imprisonment it was in reality a civil contempt case. The Court held, it is respectfully submitted, that if the act complained of is the performance of a prohibited act, then the nature of the contempt must be criminal because the rationale of the *Nevitt* case is inapplicable. Further support for the proposition that the defendant must have the ability to purge himself is *Maggio v. Zeitz*, 333 U.S. 56.

In the *Schillitani* case the defendants were imprisoned beyond the term of the Grand Jury. The Court held that since it was a civil contempt proceeding such a term of

imprisonment was improper because the defendants could not purge themselves of the contempt once the Grand Jury ceased to exist. The Court specifically stated that the rationale for civil contempt vanished at the death of the Grand Jury.

The doctrine of punishment by civil contempt must permit a defendant to purge himself of that contempt. While it is true that the same act may constitute a civil and criminal contempt, in the case of a violation of a restraining order that can only be true if at the time of the contempt proceeding the defendant is presently engaging in the prohibited act. Once that act has ceased, there can be no civil contempt because there is nothing the defendant can do to presently comply with the Court's order.

In the instant case, at the time of the filing of the petition, and the amended petition, the defendant union was not presently engaging in a prohibited act. The allegations of the petition clearly establish that the Board contended the respondent had in the past engaged in prohibited acts. The remedy sought by the Board on its face seeks compliance with the Court decrees. It is asked how this respondent in the facts of this case can purge itself of contempt. It could not be fined until it complies with the decrees because it is presently in compliance with those decrees. An officer certainly could not be imprisoned for civil contempt inasmuch as he would have no way of purging himself. The Board in reality, notwithstanding its characterization to the contrary, sought to punish the defendant for past acts performed. While it is submitted that a Court has a perfect right in the proper proceeding to punish, they do not have such a right, in a civil contempt proceeding.

Nowhere in the judgment is there a provision for the respondent to do any act or refrain from doing any act which it is presently performing or not performing in violation of the decrees.

The Court of Appeals recognized that a civil contempt proceeding may be inappropriate if the alleged illegal conduct consisted of a single act. It did not decide that question however, as in its opinion, the argument was inapplicable because in the instant case, the alleged contemptuous conduct occurred on four occasions.

Its distinction, it is respectfully submitted, is not relevent, is not supported by prior decisions of this Court, and is contrary to prior decisions of this Court.

In view of the conflict which exists between the decision of the Court of Appeals herein and applicable decisions of this Court, it is respectfully submitted; that review by this Court of this question is appropriate and necessary to resolve the conflict.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,091

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and PETER WEBER, WILLIAM DUFFY and JOHN WILSON,

Respondents.

No. 17,092

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 825, AFL-CIO, PETER WEBER, its business manager,

Respondents.

ON PETITION FOR ADJUDICATION IN CONTEMPT

Argued April 8, 1970

Before HASTIE, *Chief Judge*, and FREEDMAN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT
(Filed August 25, 1970)

HASTIE, *Chief Judge*.

The present proceeding was initiated by a petition of the National Labor Relations Board praying, *inter alia*, that Local 825, International Union of Operating Engineers, be adjudged in civil contempt by reason of alleged secondary boycotting in violation of decrees of this court entered on October 22, 1963 at Docket No. 14,318 and on August 5, 1966 at Docket No. 15,928, that required the union to cease and desist from coercing neutral employers or inducing their employees to stop working with an objective of causing any neutral employer to cease doing business with a party to a labor dispute.

After an answer had been filed and certain motions had been adjudicated, this court appointed Honorable Albert B. Maris, a Senior Circuit Judge, as special master to summon witnesses and to conduct hearings on the matters in dispute, to report findings of fact and conclusions of law and to recommend to this court appropriate dispositive action. Judge Maris conducted hearings for eight days and heard 42 witnesses. After fully hearing the parties on the facts and applicable law, he filed an elaborate report in which he summarized and evaluated the evidence concerning the several occurrences alleged to constitute contempt of the orders of this court, made detailed findings of fact, set out conclusions of law predicated on his fact-finding and recommended that this court adjudge the union in contempt of its decrees and impose specified sanctions. After a hearing at which the union presented its objections to the special master's report, the court is now in position to take dispositive action.

Preliminary, the union has argued that the alleged wrongs cannot constitute civil contempt because the episodes in question occurred and were concluded some time ago, so that only a punitive criminal proceeding, as distinguished from a remedial civil one, can be appropriate.

Whether this contention might have merit where a single act of contumacy has been charged, we need not and do not decide. In this case unlawful secondary boycotting of the kind prohibited by our decrees is said to have occurred on four occasions involving different neutral employers and employees. Indeed, two of these episodes are alleged to have occurred after a rule to show cause had issued on the present contempt citation and were added to the wrongs charged in this proceeding on petition of the Board. If such repeated violations of particular prohibitory decrees of this court have occurred, a civil proceeding is appropriate to determine whether the misconduct amounted to contempt and, if so, what civil sanctions are appropriate and reasonably calculated to cause the union to abandon a course of intermittent flouting of our decrees whenever such misconduct may seem to serve its purposes.

The charge of contempt is based upon alleged occurrences at different times on four different construction sites. In each case, there was a "primary" employer with whom the union allegedly had a dispute. Each occurrence involved alleged union misconduct in relation to a different "neutral" employer or his employees. Like the special master, we have considered each occurrence separately.

OFFICE BUILDING CONSTRUCTION AT SOUTH BOUND BROOK

The special master's conclusion was that the union had induced employees of United Crane & Shovel Service Co.

and Allan Bros. & O'Hara, neutral employers, to refuse to work for their employers and had coerced those employers with an object of forcing them to cease doing business with Morin Erection Co., a primary disputant.

The union contends, as it did before the special master, that the employees of United who were induced to stop work were also employees of Morin so that there was no secondary boycott. However, the evidence concerning the status of these employees and the role of United as the employer who hired them and retained the right to control them justified the special master's finding that the employees in question were employees of the neutral United, and of United alone. Separately, the union characterizes as mere "conjecture" the special master's finding that the work stoppage by these employees was induced by remarks of a union agent. All of the circumstances considered we think the special master's finding as to the cause of the work stoppage represented a clearly reasonable inference from the evidence as to the attendant circumstances, including the things said and done shortly before the work stoppage.

The union also argues that the evidence shows that it did not "threaten" or "coerce" the neutral employers but rather that it meerly advised them of its dispute with Morin and solicited their help in achieving a fair settlement. While no threatening words were used we find sufficient evidence of coercive pressure upon neutrals to support the special master's conclusion that prohibited coercion occurred. In this connection we observe that though Morin was conducting a small operation at one end of a large job site with two entrances, the entire site was picketed beginning early in the morning before Morin's men began work.

ESSEX COUNTY COURTHOUSE CONSTRUCTION AT NEWARK

The special master has found that, with an object of forcing Petillo Bros., a neutral employer, to cease doing business with S. S. Silbertblatt, Inc., an employer engaged in a primary dispute with the union, the union coerced Petillo Bros. and induced its employees to refuse to work.

The union urges that the present record does not provide adequate evidentiary support for the special master's finding that the union member, a lead engineer, who told the neutral employer to stop work acted as agent for the union. However, on conflicting evidence the special master reasonably found that the lead engineer acted in representative capacity with the knowledge and assent of the union. It is relevant in this connection that after a work stoppage had begun a higher and unquestionably responsible union officer refused to approve the resumption of work by the neutral employer under his contract with the primary disputant. We find no merit in the union's separate argument that the record does not justify the special master's finding that the union representative coerced the neutral employer.

SCHOOL CONSTRUCTION SITE AT CORNWALL, NEW YORK

The special master found that the union had induced employees of Hambly Construction Co. to refuse to work for their employer and had coerced the employer Hambly with an object of compelling Hambly to cease doing business with Kondracki & Sons, an employer with whom the union had a labor dispute.

Disputing this conclusion, the union argues that the "work stoppage" upon which the claim of union wrongdoing is predicated was no more than a routine "coffee break." The record does show that the employees stopped work at about the time when normally they would take a morning coffee break. But there is evidence that they remained idle after the coffee truck left and did not resume work until the primary disputant Kondracki, an earth moving contractor, left the job.

However, there is another aspect of the work stoppage and the related temporary removal of the primary disputant from the job. Kondracki was engaged in bulldozing and it does not appear that the operating engineers had any direct interest in such work as he was doing, although the union was concerned that Kondracki's employees were members of an unaffiliated labor organization that the union did not recognize. On the other hand, a third union, the Teamsters, did actively object to the operation of Kondracki's bulldozer by members of a rival union. Indeed, there is evidence that a Teamsters' representative threatened Hambly because of Kondracki's presence on the job. The Teamsters' representative, as well as respondent's representative and other union agents, was at the job site the day the work stoppage occurred and Kondracki was compelled to withdraw. Moreover, it does not appear that the respondent union's representative did more than tell Kondracki, the primary disputant, that he was going to contact the building trades about picketing the job. An employee of Hambly overheard this conversation and reported it to his superior. We think this permissible threat directed to Kondracki does not amount to a clear and convincing showing that the respondent coerced Hambly or induced Hambly's employees to stop work, particularly when there

is evidence that the coercion to which Hambly was subjected came from another more immediately concerned union.

Accordingly, we will not adopt the special master's conclusion that the respondent engaged in contemptuous misconduct in connection with the school construction project at Cornwall, New York.

ROYAL LUBRICANT CONSTRUCTION SITE AT HANOVER

The special master found that the union, with an object of forcing neutral employers to stop doing business with Morin Erection Co., a contractor engaged in a primary dispute with the union, induced employees of Hermes & Young, Inc., a neutral employer, to stop work and coerced another neutral employer, Becker Construction Co.

Here, as in the controversy at the Essex County Courthouse site, the union contends that the lead engineer for whose conduct the union has been held responsible did not act as a union representative. However, there is credible evidence that, after protesting to subcontractor Morin and to the neutral principal contractor about Morin's use of a non-union operator of a welding machine, the lead engineer reported his activity to the union's business agent and thereafter continued his activity in the interest of the union without any union disavowal. The special master's finding that the union acted through the lead engineer was amply justified by the evidence.

The union also contends that the evidence does not warrant a finding that the lead engineer coerced a neutral employer. However, there is credible evidence that he urged the neutral contractor to cancel Morin's contract unless he should employ a union engineer and stated that

a work stoppage would occur unless something should be done about this. The special master's finding of prohibited coercion of a neutral is adequately supported by the evidence.

More generally, we have considered the union's contention that such secondary activity as occurred on each of the projects now under consideration is not significantly different from the activity we refused to proscribe in *NLRB v. Local 825, IUOE*, 1964, 326 F.2d 218 and *NLRB v. Local 825, IUOE*, 1969, 410 F.2d 5, *cert. granted* 397 U.S. 905. However, in each of the situations where we now find contempt the special master has found, we think properly, that the objective of union pressure upon the neutral contractor was to compel that contractor at least to suspend a contractual dealing with the primary disputant so long as the dispute with the union remained unsettled. It was because, in our judgment, the record did not warrant such a finding in the cited cases that we reached a different result.

THE REMEDY

In our earlier discussion of jurisdiction we concluded that the misconduct of the union was such as might properly support a charge of civil contempt and the imposition of sanctions. We now consider whether the sanctions recommended by the special master are appropriate and should be imposed.

The union objects to a recommendation that it reimburse the Board for all expenses, including attorneys' fees, incurred in prosecuting this contempt proceeding. In so doing, the union incorrectly views such an imposition as punitive. Actually, it is no more punitive than awards of

costs and attorneys fees that frequently are made in ordinary civil cases. Moreover, the Supreme Court has repeatedly recognized the compensation of the complainant for losses or expenses incurred because of the wrongdoing as an appropriate part of the remedy in civil contempt cases. *Eg.g., McComb v. Jacksonville Paper Co.*, 1949, 336 U.S. 187; *United States v. United Mine Workers of America*, 1947, 330 U.S. 258. We find this sanction appropriate.

The union also objects to the special master's recommendation that the remedy include a present determination that each future flouting of the decrees now found to have been violated, shall subject the union to the payment of a compliance fine of $10,000 plus $1,000 per day for each day that such a violation shall continue. We have imposed such contingent compliance fines in other cases. *NLRB v. Local 676, Teamsters Union*, No. 15,259, order of March 25, 1969; *NLRB v. General Precision, Inc.*, No. 16,132, order of August 4, 1967. This type of sanction is particularly appropriate here because the record shows that repeated violations of the decrees in question have occurred at different times and places. To deter the continuation of this intermittent course of conduct is a proper remedial objective served by the proposed contingent compliance fine. Of course, if any charge of future violation is made, the charge must be established by clear and convincing proof before there can be an adjudication of contempt and a consequent imposition of the specified compliance fine.

The proposed remedy also includes requirements that notices of this adjudication coupled with a promise of future compliance be posted at appropriate places, read at specified membership meetings and distributed both to the

individual members of the union and to all employers with whom the union had signed contracts. The union contends that these requirements, other than the posting of notices, are both unnecessary and demeaning. In our view, however, their purpose and probable cumulative effect is to inhibit the repetition of such violations as have been disclosed here by encouraging union members and employers to exert their influence against the recrudescence of wrongdoing by union officers and agents.

The findings and conclusions of the special master, other than those concerning the occurrence at the Cornwall Elementary School site, will be adopted and the recommended sanctions will be imposed. An appropriate decree may be submitted.

Judge Freedman would also approve the special master's conclusion that the respondent engaged in contemptuous misconduct in connection with the school construction project at Cornwall, New York.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT IN CIVIL CONTEMPT

Before: Hastie, Chief Judge and Freedman and Van Dusen, Circuit Judges

This cause came on to be heard upon the petition of the National Labor Relations Board to adjudge Local 825, International Union of Operating Engineers, AFL-CIO, in civil contempt for failing to comply with two decrees of this Court entered against said Local 825 on October 22,

1963 and August 5, 1966. On December 2, 1969, Honorable Albert B. Maris, Senior Circuit Judge, issued his report as Special Master, in which he found that Local 825, its officers and agents engaged in unlawful secondary boycott activities at four different construction sites and recommended that it be adjudged in civil contempt of the said decrees. On April 8, 1970, the Court heard oral argument on exceptions filed by Local 825 and on August 25, 1970, issued its decision approving and confirming the Master's report with respect to the occurrences at three of the aforesaid sites and approving in all respects the contempt remedies recommended by the Master. In conformity therewith it is hereby

ORDERED AND ADJUDGED that the respondent, Local 825, International Union of Operating Engineers, AFL-CIO, is in civil contempt for having violated the Court's decrees entered October 22, 1963 and August 5, 1966, and

It is FURTHER ORDERED that the respondent Union, by its officers and agents, shall purge itself by:

(1) Forthwith complying in full with each and every provision of the Court's decrees of October 22, 1963 and August 5, 1966.

(2) Immediately posting in conspicuous places, in its business offices, meeting halls, and all places where notices to its members are customarily posted, for a period of sixty days, copies of the contempt adjudication and of an appropriate notice, in the form to be supplied by the Board, signed by an appropriate officer on behalf of Local 825, International Union of Operating Engineers, AFL-CIO, stating that the respondent Union has been adjudicated in civil contempt of this Court for violating and disobeying

the Court's decrees of October 22, 1963 and August 5, 1966 and that it will hereafter comply with the said decrees and with Section 8(b)(4)(i) and (ii)(B) of the Labor-Management Relations Act, 158 U.S.C.A. §158(b)(4)(i) and (ii)(B), such notices together with a copy of the contempt adjudication to be maintained in clearly legible condition throughout such posting period, and insuring that such notices are not altered, defaced or covered by any other material.

(3) Immediately signing and mailing copies of said notice to all employers with whom the respondent Union has a signed agreement.

(4) Immediately signing and mailing copies of said notice to all members of the respondent Union.

(5) Immediately reading said notice by an officer of the respondent Union before a general meeting of members called for this purpose both in Newark, New Jersey, and in Newburgh, New York.

(6) Filing a sworn statement with the Clerk of this Court and copies thereof with the Regional Director for the Twenty-second Region, Newark, New Jersey, and separately notifying said Regional Director in writing within thirty days after the entry of this order of adjudication, showing what steps have been taken by the respondent Union to comply with the Court's directions.

(7) Paying to the Board an amount adequate to compensate the Board for its costs and expenses including salaries in investigating, preparing and presenting the matters involved in these proceedings, the amount of such compensation to be determined upon proof submitted by the Board when these proceedings are finally concluded.

(8) Paying the costs of these proceedings in this Court, including the cost of printing the Special Master's report.

In order to insure compliance with the foregoing provisions.

It is FURTHER ORDERED that upon the failure of the respondent Union to purge itself of contempt as herein provided, this Court will deal further with the matter by imposing a compliance fine of $10,000 on the respondent Union for each future violation of the decrees of the Court and a further compliance fine of $1,000 per day for each day that such a violation continues, and by such other means as the Court shall determine, including the issuance of attachment against the respondent Union and any Union officer or agent responsible therefor.

Dated: October 8, 1970

FOR THE COURT

/s/ William H. Hastie
WILLIAM H. HASTIE
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17091 [No. 14318]

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and PETER WEBER, WILLIAM DUFFY and JOHN WILSON,

Respondents.

No. 17092 [No. 15928]

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 825, AFL-CIO, PETER WEBER, its business manager,

Respondents.

REPORT OF ALBERT B. MARIS, SPECIAL MASTER

PLEADINGS FILED AND ORDERS ISSUED IN CAUSES DOCKETED AS NOS. 17091 AND 17092 [PRIOR DOCKET NOS. 14318 AND 15928]

The National Labor Relations Board filed a petition praying that Local 825, International Union of Operating Engineers, AFL-CIO, hereinafter called the Union; Peter Weber, its president and business manager; John Pierson, one of its business representatives, and Robert Fanning, another of its business representatives, be adjudged in and punished for criminal contempt by reason of their having engaged in secondary boycott activities thereby violating disobeying, and refusing to comply with two decrees of this Court, entered on October 22, 1963 and August 5, 1966 at its docket Nos. 14318 and 15928, respectively, which enforced the Board's orders requiring the respondent to cease and desist from certain practices and to take certain affirmative action. Further, the Board in its petition prayed that this Court adjudge the Union to be in civil contempt because of the alleged disobeyance of the said two decrees and prayed for an order requiring the Union to purge itself of such contempt by fully complying with and obeying the decrees of this Court. Specifically, the Board's petition alleged that at three separate construction sites, located at South Bound Brook, New Jersey; Newark, New Jersey, and Cornwall, New York, the Union had applied prohibited secondary pressures against neutral employers in order to force them to cease doing business with employers with whom the Union had disputes.

An order was issued upon the Union to show cause why it should not be held in civil contempt and the Union was

directed to answer the Board's original petition only on that aspect which sought an adjudication in civil contempt. The Union answered, denying that it had disobeyed this Court's decrees, raised various affirmative defenses, challenged the jurisdiction of this Court to try the civil proceedings, and requested trial by jury on the civil contempt issues. The Board filed a motion to strike the Union's request for a jury trial and also to strike certain of the Union's affirmative defenses, which was granted by order of May 2, 1968 denying the Union's request for a jury trial and striking from the answer its affirmative defenses numbered 3A, 4, 5 and 8.[1] The Board had also moved for the appointment of a special master to hear the evidence and make recommendations upon the issues raised in the civil contempt proceedings. On May 17, 1968 an order of reference was entered appointing me as special master to summon witnesses and conduct hearings upon the matters in dispute and to report findings of fact and conclusions of law thereon.

During the pendency of these proceedings before me, the Board filed a motion for leave to supplement its petition alleging that the Union had exerted secondary boycott pressures at another construction site, this one located at Hanover, New Jersey. The Board was granted leave to supplement its original petition for adjudication in civil

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[1] The affirmative defenses stricken from the answer were the following:

Paragraph 3A: the Union claimed that the charges concerning Morin Construction Company at the South Bound Brook site were the basis of a prior proceeding before the Board and that relitigation of the same matters was unwarranted;

Paragraph 4: that none of the employers mentioned in the petition were named in the two decrees alleged to have been violated;

Paragraph 5: that it was not the intent of the two decrees to cover any of the employers named in the Board's petition; and

Paragraph 8: that this Court does not have jurisdiction to try this matter.

contempt and other civil relief and the Union was directed to answer the additional allegations. On December 3, 1968 the time for answer by the Union was extended to December 13, 1968. The Union answered, denied any violations and demanded trial by jury on the new issues raised in the supplemental petition. The Union's demand for jury trial on the additional issues was denied and the new matter was referred to me for consideration in accordance with this Court's order of December 3, 1968.

Proceedings of the Special Master

A prehearing conference was held in Philadelphia on July 16, 1968 and hearings were commenced on September 9 and continued on September 10 and 11, 1968, November 18 and 19, 1968, December 26 and 27, 1968, and concluded on January 7, 1969. For the convenience of a majority of the witnesses called, the hearings were held in Newark, New Jersey. 42 witnesses were heard. The Board's Exhibits Nos. 1, 2, 3, 3A, 4 and 5, and the Union's Exhibits Nos. 1 and 5 were received in evidence. The transcript totals 1090 pages. Counsel have now filed their requested findings of fact and conclusions of law together with briefs in support thereof.

Jurisdiction

In limine, the Union attacks the jurisdiction of the Court to try these cases, arguing that a civil contempt proceeding cannot lie and it requests that I recommend to the Court that the petition of the Board be dismissed for that reason. The Union says that even if it had engaged in the illegal secondary boycotts charged by the Board, those acts had ceased at the time the petition was filed, and since

the prohibited acts had ceased, the Court lost civil jurisdiction because there is nothing the Union can now do to purge itself of that contempt. The Board opposes the contention of the Union that civil contempt is avoided if at the precise time that the Board's petition is filed the Union is not engaging in a prohibited act and argues that under the Union's theory the latter may refuse to obey the Court's decrees and a whole series of violations may be perpetrated with which the Court would be powerless to deal through civil contempt proceedings.

I do not consider this contention, however, for it is clear that this issue was not a matter referred to me for consideration. On the contrary, the Union sought to raise this issue in its answer as affirmative defense numbered 8 but, as I have indicated, this defense was stricken from the answer by the Court's order of May 2, 1968.

I turn accordingly to those matters which have been referred to me for consideration, namely, the contentions of the Board that the Union, in four separate incidents, violated section 8(b)(4)(i) and (ii)(B) of the Labor-Management Relations Act, 29 U.S.C.A. §158(b)(4)(i) and (ii)(B),[2] thereby violating the two decrees of this Court prohibiting such conduct.

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[2] The pertinent provisions quoted by the Board are:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged . . . in an industry affecting commerce, where in either case an object thereof is—

. . .

"(B) forcing or requiring any person . . . to cease doing business with any other person . . ." [29 U.S.C.A. § 158 (b) (4) (i) and (ii) (B)].

I

Occurrence at Construction Site at South Bound Brook, New Jersey

The Board's petition alleges that the Union violated the Court's decrees of October 22, 1963 and August 5, 1966, in that in furtherance of a dispute between the Union and Morin Erection Co., the Union, acting through its agents, Victor Belmonte and Jack Smith, induced individuals employed by persons engaged in an industry affecting commerce to engage in a strike and refusal in the course of their employment to perform services at the South Bound Brook construction site and, further, coerced such persons with the object of forcing and requiring them to cease doing business with Morin.

Upon consideration of the evidence I make the following

Findings of Fact

1. At all times material:

(a) The firm of Allan Brothers & O'Hara was an employer engaged in the building and construction industry and was the prime contractor for the construction of a manufacturing and office building for Waldron & Hartig Division of Midland-Ross Corporation at South Bound Brook, New Jersey.

(b) Volunteer Structures Company was an employer in the construction industry and a subcontractor of Allan Brothers & O'Hara for the erection of structural steel at the South Bound Brook site.

(c) Morin Erection Company, hereinafter called Morin, was an employer engaged in the construction industry installing steel decking at various job-sites in various

states. Morin was the subcontractor of Volunteer Structures Company for the erection of the steel roof-deck at the South Bound Brook site. In order to perform this contract, the steel material for the roof-decking was required to be hoisted or lifted.

(d) United Crane & Shovel Service Company, hereinafter called United, was an employer engaged in the business of renting cranes owned by it with operators and oilers paid by United, or without such employees, to persons in the building and construction industry.

(e) The above are all persons engaged in industries affecting interstate commerce.

2. Morin rented the service of a crane from United to hoist Morin's materials for the roof-decking job, to commence work on August 10, 1966, to be manned by an operator and oiler, at the lump sum of $250.00 per day. The crane, together with its crew, arrived at the South Bound Brook site on August 10, 1966, before 8 A.M.

3. Before the crane could operate, the boom was required to be assembled. The crane operator pulled levers inside the cab to lower the boom while ironworkers, employees of Morin, put bolts in the boom. This was done under the direction of John Cyr, Morin's superintendent on that job. During this operation, Simeon Morin, vice president of Morin, was also present. Morin did not have a collective bargaining agreement with the respondent Union but did have a contract with the Ironworkers Union.

4. Morin had a primary labor dispute with the Union concerning Morin's refusal to employ one of the Union's operating engineers to start and stop an electric welding machine used by Morin in welding structural steel.

5. Victor M. Belmonte, a member of the Union who was employed by another contractor at the South Bound Brook site, functioned as the Union's shop steward. His duties included seeing that the Union's policies were carried out. He examined the Union books of other employees at the job site. On August 10th he checked the Union books of United's crane operator and oiler when they arrived. The crane-operator and oiler employed by United were members of the respondent Union.

6. During the latter part of June 1966 Belmonte had ascertained from William Crum, general superintendent for Allan Brothers & O'Hara, the prime contractor, that Morin was going to perform the steel roof-desking work. At that time Belmonte told Crum that Morin had had some difficulties with the Union on several previous jobs and that unless Morin had come to some agreement with the Union "they wouldn't allow any hoisting operators to work for him on this job" (Tr. 97). Crum called Morin's office to alert the firm of this possibility.

7. The Morin truck on the job site contained a welding machine which was bolted to the frame, but that particular machine never welded roof deck.

8. On August 10, 1966 after the boom of the crane had been assembled, Belmonte told the crane operator, Mike Vitoli, to "check out" with the Union hall (Tr. 276). Vitoli left the crane and walked in the direction of the construction office to make a telephone call. After he returned, he did not operate the crane that day and no hoisting service by United's crane was performed for Morin.

9. Jack Smith, business agent for the Union, arrived at the construction office on August 10, 1966 about 11:30 A.M. and had a conversation with Simeon Morin in respect to

employing a Union operating engineer for Morin's welding machine. When Simeon Morin answered in the negative Smith told him that Morin would not "go to work" (Tr. 20). Smith then left the construction site.

10. On the afternoon of August 10th, Crum asked Belmonte about a rumor that the job would be picketed the next morning. Belmonte confirmed that possibility.

11. That afternoon Crum instructed Morin's ironworkers not to come on the job the next morning. He gave Simeon Morin the same instructions, who assured Crum that Morin's men would not be the job the following morning and that Morin's differences with the Union would be "cleared away" before Morin started any work on that job (Tr. 109).

12. The next morning, August 11th, at about 7:45 A.M., groups of pickets assembled at the two entrances to the South Bound Brook site, about five or six pickets at each entrance. Belmonte was walking in one of the picket lines carrying a picket sign. The signs contained the following handprinted legend (Tr. 154):

"Information to Public

"Employees of Morin Erection Company do not receive area standard wages, benefits and working conditions.

Local 825, International Union of Operating Engineers"

13. At about the same time Simeon Morin came on the job site with Delano Morin, president of Morin, John Cyr, Morin's superintendent for hoisting the material, and two other ironworker employees. There were automobiles parked along the road and a group of men were standing outside the construction area. The pickets were then at each entrance.

14. Simeon Morin spoke to Al Shinn, another crane operator sent by United, who said "he wasn't going to operate before the problem was taken care of with his delegate" (Tr. 26). After conversing with Crum, Simeon Morin left the job site. United's crane did not operate that day for Morin.

15. Although some cement trucks crossed the picket line that morning, they were standing idly by; there was no pouring of cement while the picketing was in progress. Nor is there any evidence that any work by employees was actually performed before the picket line was removed.

16. Shortly after 8 A.M. that morning Crum called Charles Auginbaugh, plant manager for Waldron & Hartig Division of Midland-Ross Corporation, advising him that the construction work could not progress because there were pickets at the site.

17. Auginbaugh arrived at the site, was referred to Belmonte as the man in charge of the picketing; Auginbaugh asked Belmonte why he was picketing the job site and Belmonte pointed to his picket sign saying "that they had trouble with this contractor on various jobs" (Tr. 119). Auginbaugh asked Belmonte to remove the picket line but Belmonte said he had no authority to do so but would call his superior on the telephone at the Union. Auginbaugh told Belmonte that if "there were, in effect, any legitimate grievances by any union on the job that that particular contractor would have to resolve his differences or get off the job" (Tr. 120). Jack Smith was called on the telephone by Belmonte and the phone subsequently handed to Auginbaugh who told Smith that legitimate problems between the Union and the contractor "would be resolved or the contractor would be off the job" (Tr. 122). Smith then

instructed Belmonte to remove the pickets. The picket line was dispersed about 9:30 A.M. on August 11th.

18. Morin's employees were not involved in a labor dispute with Morin nor were they on the picket line. Morin left the job site before the pickets were removed and was advised by Crum not to return until its problem with the Union was resolved.

Discussion

The Board contends that the evidence supports its charge that the Union engaged in a course of conduct designed to coerce neutral employees with an object of bringing pressure through them to force Morin to comply with the Union's demands or to have Morin removed from the job. This, the Board says, was sought to be accomplished by Belmonte by stopping United from working for Morin on August 10th, by a warning to the prime contractor that a picket line would appear, and by the picket line which did appear the next morning under Belmonte's direction.

First, the Union, while admitting that Belmonte was its shop steward, denies that there is sufficient evidence to support a finding that he was an agent whose actions are binding upon it. In this regard the responsibility of the union for the particular acts of a steward is determined by general principles of agency law. *N.L.R.B. v. Brewery & Beer Distributor Drivers, etc.*, 3 Cir. 1960, 281 F.2d 319, 322; *N.L.R.B. v. Inter. Broth. of Boilermakers, etc., Local No. 83*, 8 Cir. 1963, 321 F.2d 807, 810. Certainly if he acts only as an individual rather than within the authority the union has conferred, the union is absolved. *N.L.R.B. v. Local 815, Internat'l Bro. of Teamsters, etc.*, 2 Cir. 1961, 290 F.2d 99, 104. In determining whether a person is acting as an agent of another "the question of whether the

specific acts performed were actually authorized or subsequently ratified shall not be controlling." Section 2(13) of the Labor-Management Relations Act, 29 U.S.C.A. §152(13). There is no evidence here from which the inference can be drawn that Belmonte was acting as an individual. On the contrary, it is clear he was acting on behalf of the Union, as its shop steward. Accordingly, Belmonte's statements and actions on behalf of the Union are attributable to it, whether expressly authorized or not.

The Union next argues that the crane operator and oiler were in reality employees of Morin and hence their work stoppage involved their own employer, Morin. I find no merit in this contention. The fixed rate of $250.00 per day charged Morin for the service of a crane included the crew from 8 A.M. to 4:30 P.M., with an overtime charge if so used. United selected the particular men sent with the crane; the crew were on its payroll and it made all the payroll deductions from their wages; United had a collective bargaining agreement with the respondent Union covering these employees. On the other hand, the crane operator and oiler were not carried on Morin's payroll; Morin carried no insurance on these men nor made any of the standard deductions on their behalf. If any one of the crew proved to be unsatisfactory Morin could not fire him but would be required to call United for a substitution.

It is true that in performing service for Morin, the crane and its crew were under the direction of John Cyr, Morin's superintendent for the hoisting job. In hoisting the material, the operator would be directed as to where to place the crane, told what Morin wanted lifted, and by voice or arm signal would be told where Morin wanted the hoisted

material placed. However, in performing its service, the operator and oiler were not directed as how to perform their functions properly. If United's crew had operated the crane, Morin's ironworkers on the ground would have attached the roof-decking material to the hook of the crane and after hoisting, the material would have been detached by other ironworkers waiting on the roof. The Board contends that this relationship did not change the status of the employees of United, nor did it make Morin and United allied employers. In support of its poistion, the Board relies on *Labor Board v. Denver Bldg. Council*, 1951, 341 U.S. 675, 689-690, in which case the Court said:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overriden without clear language doing so."

The Union, however, argues that the Denver Building case concerned a contractor-subcontractor relationship and therefore is inapplicable here. It is the Union's contention that the relationship of Morin and United was that of lessee-lessor, which it is argued calls for the application of a different principle. The distinction thus sought to be made has no legal basis, however. The existence of the employer-employee relationship is generally determined from the particular facts and circumstances of the case. Ordinarily four elements may be taken into consideration, (1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages, and (4) who has the right to control the conduct of the employee

when he is performing the particular job in question. See Restatement 2d, Agency §220; 35 Am. Jur. Master and Servant §§3, 4. In *Outdoor Sports Corp. v. American Fed. of Labor*, 1951, 6 N.J. 217, 78 A.2d 69, 75, the Court said:

> "It is of the essence of the employer-employee relationship that there be a hiring for a fixed or definite period of time for either fixed wages or some form of remuneration fixed or agreed upon and that the employee's work should be subject to the direction and control of the employer."

In *Funk v. Hawthorne*, 3 Cir. 1943, 138 F.2d 686, 688, Judge Goodrich, in speaking for the Court stated:

> ". . . That the general employer may at any time substitute another employee and that he rents the machine and employee together, particularly where that is his business, are factors indicating a continuation of general employment. Pointing to a similar conclusion, although not necessarily decisive, would be the fact that the general employer paid the wages, deducted taxes therefrom, supplied the gas and oil, kept the trucks in repair and that the instrumentality was a valuable one requiring the services of a skilled operator."

In *Pennsylvania Smelting & Refining Co. v. Duffin*, 1950, 363 Pa. 564, 70 A.2d 270, 271, the court had occasion to determine whether one hiring a crane and operator, became, under the facts of that case, the employer of the operator. The Court said:

> ". . . Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, since he is engaged

in the very occupation for which he was originally so employed . . . That initial presumption is here strengthened by all the circumstances attending the hiring and the operation of the crane. Defendant was in the regular business of renting cranes together with their operator, and he had the power not only in each instance to send an operator of his own choice but at any time at his pleasure to take him off the job and substitute another,—something which, of course, plaintiff had no right to do. The possession of such power is significant in the consideration of the right of control . . . Plaintiff was not in the business of operating cranes, which is an activity requiring technical skill on the part of the operator,—a fact that is likewise important in determining the question here involved, for it is inconceivable that the parties could have intended that plaintiff was to direct a specialist in a field in which it would have been wholly incompetent."

Applying these principles of law to the facts of this occurrence, I conclude that United and Morin were not allied employers and that the crane operator and oiler were employees of United, a neutral employer in regard to the Union's labor dispute with Morin.

The Union further argues that the record is devoid of evidence that its conduct was designed to compel any neutral employees in the course of their employment not to work for a neutral employer or that its conduct was designed to compel any neutral employer or contractor to cease doing business with Morin. In considering this question, I bear in mind that to constitute unlawful secondary activity the Union must exert pressure upon the neutral employer with the object of forcing him to cease doing business with the employer with whom the Union has its dispute, frequently described as the primary employer. The

gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute but upon some third party who has no concern in it. Its aim is to compel him to stop doing business with the employer in the hope that this will induce the employer to give in to his employee's or the Union's demands. *Electrical Workers v. Labor Board*, 1961, 366 U.S. 667, 672 (General Electric Co.); *International Brotherhood v. National Labor Rel. Bd.*, 2 Cir. 1950, 181 F.2d 34, 37. In this regard, the Supreme Court in *Electrical Workers v. Labor Board*, *supra*, said: [366 U.S. at 672-674, 677, 679]

"But not all so-called secondary boycotts were outlawed in §8(b)(4)(A). 'The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited.' *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 98. . . .

"Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity' it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547. '[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on

their own employers.' *Seafarers International Union v. Labor Board*, 265 F.2d 585, 590. 'It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises.' *Id.*, at 591. 'Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success.' *Local 294, supra*, at 890. But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. *Labor Board v. International Rice Milling, supra.*

"However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although '[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute,' *Sales Drivers v. Labor Board*, 229 F.2d 514, 517, '[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent.' *Seafarers International Union, supra*, at 591.

. . .

". . . The *Moore Dry Dock* case, *supra*, laid out the Board's new standards in this area. There, the union picketed outside an entrance to a dock where a ship,

owned by the struck employer, was being trained and outfitted. Although the premises picketed were those of the secondary employer, they constituted the only place where picketing could take place; furthermore, the objectives of the picketing were no more aimed at the employees of the secondary employer—the dock owner—than they had been in the *Pure Oil* and *Ryan* cases. The Board concluded, however, that when the situs of the primary employer was 'ambulatory' there must be a balance between the union's right to picket and the interest of the secondary employer in being free from picketing. It set out four standards for picketing in such situations which would be presumptive of valid primary activity; (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. . . .

. . .

". . . The application of the *Dry Dock* tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own. *Labor Board v. Denver Building Council*, *supra*, at 692."

The Union strongly urges that there is no evidence that any neutral employer or contractor was in any way

threatened, coerced or restrained or that any specific request was made that Morin be removed from that job. Hence, says the Union, Belmonte's conversations with Crum were in the nature of advice that there was a labor dispute with Morin with the suggestion that Crum intervene to secure a settlement, and that it was Auginbaugh, on the morning of the picketing, who told Smith that the contractor would be off the job to which Smith answered, "You said it, I didn't" (Tr. 178).

It may well be that the Union representative did not *orally* coerce either Crum or Auginbaugh by stating that Morin must leave, but language used, or action taken, must be construed in the light of all the surrounding circumstances. *Woodwork Manufacturers v. NLRB*, 1967, 386 U.S. 612, 644. Words harmless in themselves can take on a sinister meaning in the context in which they are used. *N.L.R.B. v. Local 254, Building Service Employees Int. U.*, 1 Cir. 1966, 359 F.2d 289, 291. The Supreme Court stated in *Electrical Workers v. Labor Board*, 1951, 341 U.S. 694, 701-702, that the "words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." Placing neutral employers or contractors in a position where they must take the initiative of ceasing to perform services or ceasing business relations in order to extricate themselves from a situation in which the Union has placed them does not absolve the Union merely because it did not orally use words of threat or coercion. Certain conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain actions may warrant the inference. Thus, the Union's protestation that its officers and agents did not orally encourage or discourage, or intend to do so, is unavailing where a natural consequence of their action was such encouragement or discouragement.

Here, Belmonte's warning to Crum that a work stoppage would occur was borne out when in fact there was a work stoppage on the morning of August 10th, after Belmonte told United's crane operator to call Union hall, the stoppage being clearly the result of that telephone call to Union hall. There is no evidence in respect to the exact language of that telephone call, but there is evidence that the crane operator told Simeon Morin that he would not commence work before Smith, "his agent" (Tr. 18), came to the job. And Jack Smith, business agent for the Union, did come to the job site that morning about 11:30 A.M. The Union, during the course of the hearings, sought to show that Smith did not know of any labor dispute between Morin and the Union or of the work stoppage. However, it would stretch credulity beyond reason to believe that Smith was unaware of the Union dispute with Morin when Belmonte was so well informed, or that Smith would leave the job site without some effort to have Union members, who were carrying on a work stoppage, return to work if the work stoppage were not indeed authorized, or that United's employees ceased working for United for no reason rather than because they were so instructed during the telephone call to Union hall. The evidence leaves no doubt in my mind that the Union induced the work stoppage of United's employees in order to force neutral employers, contractors and subcontractors, to cease doing business with Morin until such time as Morin should employ an operating engineer for Morin's welding machine.

When on the afternoon of August 10th Crum heard a rumor that pickets would appear the next day, he inquired of Belmonte whether this was true. There is a conflict in the testimony as to what Belmonte's response was but it apparently was sufficiently alarming to cause Crum to in-

struct Morin's employees not to come on the job the following morning and, in case Crum was not able so to instruct Simeon Morin, he asked the Morin employees to do so. Crum did reach Simeon Morin subsequently at his attorney's office and Crum was assured that Morin's employees would not be on the job on the following morning and that Morin's differences with the Union would be cleared away before Morin returned to the job.

The following morning, August 11th, both entrances were picketed. The Union contends that this picketing was primary in nature,[3] directed solely at Morin and not designed to enmesh neutral employees and contractors. But the record plainly shows that the dispute was one regarding the employment of an operating engineer, a fact which both Crum and Auginbaugh understood, and that Morin would not be permitted to work until the Union's demands were met. For Crum, with the threat of picketing imminent, directed Morin not to come to the job the morning of the 11th, and Auginbaugh told both Belmonte and Smith that the contractor having problems with the Union would be off the job until the dispute was settled. I find that the actions of the Union, through its agents, were not merely primary but also clearly secondary in their objectives.

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[3] It is true that peaceful picketing of a primary employer engaged in normal business upon the premises of the secondary employer, where a strike is clearly directed solely against the primary employer with whom a labor dispute exists is lawful. Seafarers International Union, etc. v. N.L.R.B., D.C. Cir. 1959, 265 F.2d 585, 591: "No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of Section 8 (b) (4)."

This brings me to the Union's final argument that even if the Board has established that the Union induced neutral employees to engage in a work stoppage and to strike, and that the Union threatened neutral employers, the Union's activities were not in violation of the Act because the Board failed to establish that an object of this conduct was to force the neutral employers to "cease doing business" with Morin. In support of this contention, the Union relies upon two cases in which the Board had found the respondent Union to have engaged in proscribed secondary activities but which, on review of the Board's findings, this Court did not sustain: *N.L.R.B. v. Local 825, Internat'l U. of Operating Engineers*, 3 Cir. 1964, 326 F.2d 218, and *N.L.R.B. v. Local 825, Internat. Un. of Op. Eng. AFL-CIO (Burns & Roe)*, 3 Cir. 1969, 410 F.2d 5. However, I find those cases wholly distinguishable on their facts. In the former case this Court held that there was a lack of substantial evidence to support the Board's conclusion that an object of the work stoppage was to force secondary employers to cease doing business with the primary employer; in the latter case this Court found that the circumstances of that case "compelled the inference that the union wanted the contractor to use its influence with the subcontractor to change the subcontractor's conduct, not to terminate their relationship." *Id.*, 410 F.2d at page 10.

There is no simple or definitive formula whereby the actions of a union can be tested to determine whether or not it has engaged in activities proscribed in section 8(b)(4)(i) and (ii)(B); the nature of acts performed shows the intent. *Electrical Workers v. Labor Board*, 1961, 366 U.S. 667, 674. In *N.L.R.B. v. New York Lithographers & Photo-Eng. U. No. One-P*, 3 Cir. 1967, 385 F.2d 551, 555, this Court observed that

"the distinction that Congress intended in §8(b)(4)(i) & (ii)(B) is difficult to apply in practice. Nonetheless, the statute compels the task. *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 645, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967). The conduct in question must be analyzed in terms of 'all the surrounding circumstances' (386 U.S. at 644, 87 S. Ct. 1250) to see whether it constitutes 'parallel primary activity' (two separate primary disputes), or 'primary activity with incidental effects,' or the proscribed 'secondary activity.' Once the conduct has as 'an object' the prohibited secondary effect, it makes no difference that there are other objectives present, be they primary or otherwise. *National Labor Relations Board v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 687-690, 71 S. Ct. 943, 95 L. ed. 1284 (1951)."

Whether the Union's conduct had an improper "object" is a question of fact. *Bedding, Curtain & Drapery Wkrs. Union, Local 140 v. N.L.R.B.*, 2 Cir. 1968, 390 F.2d 485, 489.

Upon a study of the surrounding circumstances of this occurrence, it is clear to me that an objective of the strike was to exert pressure to force neutral employers and contractors, United, Allan Brothers & O'Hara, and Waldron & Hartig, to cease doing business with Morin until such time as its dispute with the Union would be settled. When Auginbaugh told Belmonte and Smith that the contractor having problems with the Union would be "off the job", all three knew that it was Morin which was meant. Neither Belmonte nor Smith denied that it was the intention of the Union that Morin be put "off the job", nor did Belmonte or Smith disavow such an intent. As I have heretofore indicated the fact that these words came from Auginbaugh

did not alter the effect that the work stoppage and strike had upon the neutral employers and contractors nor that there was pressure exerted upon them to force them to cease doing business with Morin. Nor does the fact that Morin was off the job until such time as it would settle its dispute with the Union mean that business relations with Morin did not cease on August 11th within the meaning of the Act.

The Board argues that under the circumstances of the present case the inference is not warranted that the Union's sole object was to have neutrals use their influence with Morin, with whom the Union had the dispute, but rather that the evidence establishes that the Union, at least in part, specifically intended to have neutrals terminate their business relationship with Morin until such time as Morin met the Union's demands.[1] I agree.

Accordingly, I conclude that the evidence supports the charge of the Board that the Union on August 10 and 11, 1966, in furtherance of its dispute with Morin Erection Co., induced neutral individuals employed by neutral persons to refuse to perform any services in the course of their employment with the object of coercing neutral persons to cease doing business with Morin.

[1] While it appears that a week or so later Morin did return to the job site the Union does not suggest that this subsequent return affected the circumstances as they existed on August 10th and 11th, nor do I believe that this subsequent return changed the circumstances as they existed at that time. The record is silent as to the conditions, if any, under which Morin did subsequently return.

II

Occurrence at Construction Site of the Essex County Courthouse at Newark, New Jersey

The Board in its petition further charges that the Union violated, disobeyed, failed, and refused to comply with the decrees of this Court in that in furtherance of a dispute between the Union and S. S. Silberblatt, Inc., the Union induced a work stoppage by neutral individuals and coerced neutral persons to cease business with S. S. Silberblatt, Inc.

From the evidence I make the following

Findings

1. At the times here material:

(a) S. S. Silberblatt, Inc., hereinafter called Silberblatt, a New York corporation in the building and construction industry, was one of the prime or general contractors for the construction of the Essex County Courthouse at Newark, New Jersey.

(b) Petillo Brothers, a New Jersey partnership engaged in performing excavation work in the building and construction industry, was a subcontractor of Silberblatt for the excavation work required on the Newark construction job.

(c) The construction industry in the Newark area is highly unionized.

2. The partnership of Petillo Brothers was comprised of four brothers, Anthony, Lawrence, Joseph and Michael. Anthony acted as the operating manager whose duties included estimating, bidding and negotiating contracts, read-

ing blueprints, and directing the workmen, including his brothers. He had a hiring hall book issued by the respondent Union. Lawrence and Joseph worked as truckdrivers, operating the partnership trucks. They were members of the Teamsters Union. Michael operated a bulldozer owned by the partnership. He was a member of the respondent Union. During the summer of 1967 Robert Jones, a member of the respondent Union, was employed by Petillo Brothers to operate a bucket loader and to dump the bucket load into the trucks.

3. On or about June 5, 1967 the Union had a labor dispute with Silberblatt concerning the Union's demand that Silberblatt employ a lead engineer at the Newark job site. Edward Zarnock was referred by the Union to Silberblatt as a lead engineer at the hourly rate of $5.35 and Zarnock was so employed by Silberblatt.

4. When four or more members of the Union are employed on one job, it is a Union rule that a lead engineer be employed. John J. Pierson, business representative of the Union, counted four Union members on the Silberblatt construction job, namely, Robert Jones, operator of the bucketloader; Anthony and Michael Petillo, classified by the Union as journeymen employees, and Zarnock, as the requisite number requiring the employment of Zarnock as a lead engineer by Silberblatt.

5. As a lead engineer Zarnock was the agent of the Union on the job.

6. On or about June 30, 1967 at a meeting with Union officials, Shepard S. Silberblatt, president of Silberblatt, asked to be relieved of the lead engineer but Peter W. Weber, president and business manager of the Union, insisted that the lead engineer be retained on Silberblatt's payroll.

7. On Friday, July 21, 1967 George Rozato, Silberblatt's job superintendent, acting on Shepard Silberblatt's orders, reassigned Zarnock to the compressor machine at the compressor's rate of about $3.65 per hour, and informed Zarnock that when his services on the compressor were completed, his employment would be terminated.

8. On Monday, July 24, 1967 Pierson came to the Newark construction site and together with Zarnock, presented the Union's grievance against this action to Rozato. In the presence of Pierson and Zarnock, Rozato called Shepard Silberblatt on the telephone, who confirmed his orders and this message was relayed to Pierson and Zarnock. Pierson and Zarnock then left Rozato's office and engaged in a short conversation outside; both were dissatisfied with the failure to resolve their grievance. Pierson then walked toward the exit gate and Zarnock walked to the excavation site where the Petillo brothers and Jones were working about 30 feet below street level. Anthony was supervising Jones' operation of the bucket loader; Lawrence was sitting in a truck, and Michael was at the rear operating a bulldozer. Zarnock gestured with his hands, raising them to his chest and then to each side, which was seen by Rozato and was understood by Lawrence Petillo to be a signal to stop work. Zarnock climbed down into the excavation area, told Anthony to stop work, and then Zarnock left the job site. The excavation work stopped at 10 A.M. when the Petillo brothers and Jones left the job site.

9. As Anthony was leaving the job, he stopped at Silberblatt's headquarters and told Rozato, "They stopped me from working." Rozato then asked, "Can they do that?" and Anthony answered, "Yes" (Tr. 339, 318). Rozato then called Pierson on the telephone and they discussed what could be done to get the work started again.

10. On Saturday, July 29, 1967 Anthony Petillo received a telegram from Shepard Silberblatt telling him to return to work, that he had no cause to stop working. Anthony replied by letter stating that he could not return to work because Silberblatt had a dispute with the Union and the Union had stopped him.

11. On Monday, July 31, 1967 at 7:30 A.M. Anthony Petillo called Pierson informing him of the telegram and inquiring whether he could return to work. Pierson replied that he could not.

12. Petillo Brothers resumed work August 15, 1967 when, in a proceeding initiated by the Board for temporary relief, a United States District Court entered a consent order providing for the resumption of work pending the outcome of a Board hearing on the work stoppage charges.

Discussion

The Union admits it had a labor dispute with Silberblatt regarding the Union demand that a lead engineer be retained by Silberblatt. That a work stoppage occurred is not disputed, but the contentions of the Union are that the work stoppage was brought about by Zarnock as an individual for whose conduct the Union cannot be held responsible; that Jones stopped working pursuant to orders from Anthony Petillo who had acceded to Zarnock's personal appeal to Anthony to cooperate with Zarnock; that the brothers who participated in the work stoppage were not "employees" within the meaning of the Act, and that the evidence does not support the Board's charge that the Union coerced a partner with the objective to force Petillo Brothers to cease doing business with Silberblatt. On the other hand, the Board urges that Zarnock, either on his own initiative as the Union's agent, or upon instructions

from Business Agent Pierson, directed Anthony Petillo and the others employed by Petillo Brothers to stop work, that Pierson, who knew of the work stoppage either immediately or later that day, did not disavow the action of Zarnock or authorize Anthony Petillo to return to work, and that Lawrence Petillo as well as Robert Jones are individuals employed by the Petillo Brothers partnership, that the Union induced such individuals to cease work, and that by such inducement and its orders to Anthony Petillo to stop working and to refrain from resuming work, the Union threatened, restrained, and coerced Petillo Brothers with an object of forcing or requiring them to cease doing business with Silberblatt.

There is substantial evidence to support the Board's contention that Zarnock, as a lead engineer, acted with the Union's knowledge and assent as its agent on the job. The Union insisted that he be hired and retained by Silberblatt as a lead engineer, whose duties were described by Weber, the Union president and business manager, as "the agent . . . between the employer and the Union" (Tr. 457), and by Pierson as "the liaison man between the Union and the contractor" (Tr. 445). It is true that on the morning of the work stoppage Silberblatt intended to assign Zarnock to a compressair at compressor wages, but there is no suggestion in the record that the Union had revoked Zarnock's authority as lead engineer. His status apparently continued even after the Union knew of Silberblatt's intention to assign Zarnock to a compressor, for neither the Union nor Zarnock accepted this demotion. The dispute was presented by Pierson and Zarnock to Rozato but was not resolved in accordance with the Union's request and this dispute was the cause of the work stoppage. By the Union officers' own definition of a lead engineer's duties and status Zarnock was agent of the Union and his action, in the

absence of evidence that he acted purely as an individual, may be imputed to the Union.

I come then to the Union's argument that Zarnock appealed as an individual to Anthony Petillo to cooperate and stop working and that Anthony agreed to do so. The evidence indicates that Zarnock, after speaking with Pierson about the unsuccessful resolution of his grievance, excitedly ran to the excavation site where the only subcontractor for Silberblatt was working. Zarnock, either on his own initiative as agent for the Union or on instructions from Pierson, stopped the excavation work by signaling with his hands in a way which was recognized in the industry as a direction to stop work, and by telling Anthony to stop work. Zarnock then left the construction site and the Petillo brothers and Jones stopped working and left also. Anthony's subsequent actions negate the Union's contention that the work stoppage was done willingly or in sympathy with Zarnock. For on his way out of the worksite, Anthony told Rozato that "They stopped me". Subsequently, on July 31st, when Anthony called Pierson to inquire whether Petillo Brothers could return to work, Anthony testified that Pierson told him he could not. There was a conflict on this point. Pierson denied making this statement, testifying that he did not tell Anthony he could not return to work but that he told Anthony to use his own discretion and that Pierson did not care whether or not Anthony returned to work. In view of evidence that during the June 30th meeting of Shepard Silberblatt and Weber, Shepard Silberblatt was told that the job would stop if the lead engineer was fired, and the inferences to be drawn from other evidence, I find it impossible to believe that, during the period in which the work did stop Pierson was indifferent as to whether or not Petillo Brothers returned

to continue the excavation work. I, therefore, credit Anthony's testimony that he was told to stop work and that he could not return to work. The Union further argues that even assuming that Pierson did tell Anthony that he could not return to work, Anthony cannot be regarded as having been coerced or induced for an unlawful objective in the absence of testimony of an express threat. It has been held, however, that the words "induce or encourage" are broad enough to include every form of influence and persuasion. *Electrical Workers v. Labor Board*, 1951, 341 U.S. 694, 701-2. This Court in *N.L.R.B. v. Local 269, Int'l Bro. of Electrical Wkrs.*, 1966, 357 F.2d 51, 55, stated: "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain actions may warrant the inference." It is clear to me that Anthony understood Zarnock's statement to stop work and Pierson's statement not to return to work to be orders which he should follow, and which he did follow, until, under the court order which was issued almost three weeks after the work stoppage, Petillo Brothers were permitted to return to work.

The Union also argues that Robert Jones, an individual employed by Petillo Brothers, was not coerced or induced by the Union to stop work but that he stopped under directions from his superior, Anthony Petillo, an action for which the Union is not responsible. Jones testified that although he did see Zarnock in the excavated area where he was working, he did not observe any gestures and all that Jones knew was that his boss, Anthony, told him to stop working, which he did. The Union says that it is absolved of any responsibility for Jones work stoppage because his stoppage was not due to a direct order from Zarnock but was directed by Anthony. But whether the order was transmitted directly by Zarnock by gestures or words or was

transmitted through Anthony is immaterial, for the effect of the Union's action was the same. Jones was a neutral individual employed by a neutral employer within the meaning of section 8(b)(4)(i), and a proscribed inducement to stop work need be directed to only one employee. *Labor Board* v. *Servette*, 1964, 377 U.S. 46, 52. The dispute was solely between the Union and Silberblatt, therefore, the subcontractor, Petillo Brothers, was a neutral employer. Anthony, in relaying Zarnock's order to stop work to Jones was acting as Zarnock's agent. The evidence does not support the Union's contention that Anthony exercised executive discretion in transmitting the order, or that it came from him as the result of his decision to stop work. Accordingly, Zarnock's order to Jones constituted an inducement by the Union to Jones to stop working for a neutral employer not involved in the labor dispute with Silberblatt.

The Board strongly urges that Anthony Petillo is, under the circumstances of this case, also an employee within the meaning of section 8(b)(4)(i). It could well be argued that the Union is bound by the classification, journeyman employee, in which it had placed Anthony in counting him as one of the requisite number of employees requiring the employment of a lead engineer by Silberblatt. Suffice it to say that Anthony, either as an employee or as a partner, received the order from Zarnock to stop work and relayed this order to Jones.

The Union's final argument is that in order to constitute a violation with respect to any conduct directed toward a partner, it must be established that the partner was threatened, restrained or coerced pursuant to subsection (ii)(B) and that "mere inducement" or anything short of a threat, restraint, or coercion directed at a partner is not

illegal. It asserts that the evidence must establish that an objective of the proscribed conduct was to force or require a person [5] to cease doing business with any other person. In support of these contentions, the Union relies upon *N.L.R.B. v. Local 825, Internat'l U. of Operating Engineers*, 3 Cir. 1964, 326 F.2d 218, and *N.L.R.B. v. Local 825, Internat. Un. of Op. Eng. AFL-CIO (Burns and Roe)*, 3 Cir. 1969, 410 F.2d 5. But I find those cases distinguishable on their facts. I have had occasion earlier in this report (p. 20) to observe that in deciding whether a union has engaged in proscribed activities, the conduct in question must be analyzed in terms of all the surrounding circumstances of the case. Turning to the facts of this occurrence the evidence amply supports the Board's contention that the Union engaged in conduct proscribed whether the object of that conduct was to force or require Petillo Brothers, a neutral employer and contractor, to "cease doing business" with Silberblatt in violation of section 8(b)-(4)(ii)(B). Webster defines the word "cease" to mean "To come to an end; to stop; to leave off or give over; to desist; as, the noise *ceased*." Webster's New International Dictionary, 2d ed., p. 429. I think the evidence amply supports the Board's contention that the Union's object was to force Petillo Brothers to cease doing business—that it stop the excavation work. It was the design of the Union that Silberblatt hire a lead engineer or otherwise the construction work on the courthouse, which necessarily started with the excavation work, would stop. In this sense, the business relationship of Petillo Brothers with Silberblatt ceased, for Petillo Brothers were not permitted to resume work until such time as the Union should direct. There is

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[5] A partnership is within the meaning of the term "person". 29 U.S.C.A. § 152(1).

no evidence from which an inference can be drawn that the Union sought the aid of Petillo Brothers to heal the breach with Silberblatt. The Union says that it had nothing to gain by the cessation of Petillo Brothers' work. I am satisfied, however, that this was the leverage or pressure it used to have Silberblatt comply with its demand that a lead engineer be hired.

III

Occurrence at Cornwall Elementary School, Cornwall, New York

The third violation of this Court's decrees charged by the Board is that

> "the Union and Robert Fanning, its business representatives and each of them . . . failed and refused to comply with the said decrees of this Court in that in furtherance of a dispute between the Union and Joseph R. Kondracki & Sons, Inc., . . . the Union, acting through Robert Fanning, induced individuals employed by persons engaged in commerce . . ." to refuse in the course of their employment to perform any services and "threatened if, restrained and coerced persons engaged in an industry affecting commerce with an object of forcing and requiring persons to cease doing business with Kondracki."

Upon consideration of the evidence, I make the following

Findings of Fact

1. At the times here relevant:

(a) Hambly, Construction Co., Inc., hereinafter called Hambly, was the general contractor for the construct-

tion of the Cornwall Elementary School in Cornwall, New York.

(b) Joseph R. Kondracki & Sons, Inc., hereinafter called Kondracki, a New York corporation engaged in the excavation business, had a subcontract with Hambly for earth moving and site work at the Cornwall School job.

(c) George Silverman of the firm of Fleming and Silverman was the project architect for the Cornwall School job.

(d) Hambly and its subcontractors obtained directly from out of state materials of substantial value used in the Cornwall job and they have been regularly engaged in the building and construction industry.

2. Prior to and during August 1967 the Union had a labor dispute with Kondracki. Counsel for both parties state that for the purposes of deciding the issues they here raise, the nature of this dispute is irrelevant. In August 1967 Kondracki had a collective bargaining contract with District 50 of the United Mine Workers covering its shovel and bulldozer operators.

3. On August 21, 1967 between 4 and 4:30 P.M., Robert J. Fanning, business agent of the respondent Union, in the presence of Walter A. Ruppert, Hambly's employee in charge of outside grading, stopped John S. Van Leeuwen, Kondracki's bulldozer operator for the Cornwall job, asked for his union book, and Van Leeuwen showed Fanning his District 50 book. Fanning told Ruppert that Kondracki was non-Union, that he was going to picket, and that he was going to contact the building trades about putting a picket on the job. Ruppert called William Hambly, president of the general contractor, and "told him" (Tr. 592). That evening Van Leeuwen called Joseph R. Kondracki,

field manager for the subcontractor, and told him there would be trouble on the job the next day. August 21st was Kondracki's first day on that job; there remained to be done at least two or three days work on the parking lot and approximately seven days grading around the building.

4. The next morning, August 22d, Joseph Kondracki arrived at the job site with Van Leeuwen about 8:30 A.M. and Van Leeuwen began to grade with the bulldozer. Representatives of various building trades unions, including Fanning, arrived at the job site. Shortly thereafter a work stoppage by employees of various neutral employers occurred on the job site which I find was caused by the Union.

5. George Silverman, the project architect, arrived about 9:30 A.M. in a very agitated state, much concerned about any delay in completing construction of the school. At about 9:45 A.M. Alfred C. Januale, general superintendent for Hambly, came out of his office to investigate a report of a work stoppage. His purpose was to find out what had happened and to get the job back in progress. He saw quite a few men standing around not working. When he came outside, he approached the group of union agents, including Fanning, and asked why work had stopped. Someone in the group announced it was because Kondracki's union was not recognized. Januale returned to his office and together with Silverman called William Hambly on the telephone. William Hambly instructed Januale "to have Mr. Kondracki take his man off the bulldozer and stop his operation" (Tr. 580). Fanning saw Januale and Silverman come out of the building and walk over to Kondracki's bulldozer. Joseph Kondracki accompanied Januale and Silverman back into the building and William Hambly spoke to Joseph Kondracki over the telephone. Januale carried out William Hambly's instructions and Joseph Kon-

dracki directed Van Leeuwen to stop work on the bulldozer. About 10 or 10:15 A.M., Silverman told Fanning "everything was all straightened out" (Tr. 670). After Joseph Kondracki and his bulldozer operator left the project, everyone returned to work. A coffee truck had arrived at the site early that morning and left about 9:45 A.M.

Discussion

The Board argues that the evidence clearly shows that on the morning of August 22, 1967 there was a work stoppage of neutral employees at the Cornwall School job site, that the Union was responsible for the work stoppage, and that the object of the Union's conduct was to force Hambly to remove Kondracki from the job. On the other hand, the Union contends that the record merely establishes that the employees took a coffee break but it fails to establish that the Union had induced any neutral employees to stop work or that it had threatened, coerced or restrained any neutral employers from doing business with Kondracki.

I turn, first, to the Union's contention that there is no evidence of a work stoppage on the morning of August 22d but only evidence of a stoppage for a coffee break. It is true that a coffee truck had arrived at the site that morning and some of the men, or perhaps all of them during that period, might have stopped work to purchase coffee or just to rest. But it is also true that the union agents, including Fanning, did not deny to Januale that a work stoppage was in progress. In fact, they admitted that there was a work stoppage when they gave him a reason for that stoppage, the reason being that Kondracki's union was not recognized. The Union offered the testimony of many witnesses to the effect that there was actually no work stoppage that

morning. The Union also offered the testimony of union agents present on the site that morning who testified that they had no knowledge of any work stoppage and that they happened to be there on wholly different concerns. But I cannot credit this evidence in the light of the admission that morning by the union representatives, including Fanning, that a work stoppage was in progress. When Jamuale came out of his office to investigate the work-stoppage report, he did not see any machinery operating other than the Kondracki machine; the coffee truck was gone. He addressed the persons who were most likely to have knowledge of a work stoppage—the union agents, including Fanning. When he asked them the reason for the work stoppage, there was no denial that a work stoppage was then in progress. When the answer was given by one in the group that the reason was that Kondracki's union was not recognized, no one, including Fanning, disavowed that answer. It is well established that acquiescence may be inferred from silence, Restatement 2d Agency §94, comment b, and an estoppel may arise under certain circumstances from silence or inaction as well as from words or actions, 19 Am. Jur. (1st ed.) Estoppel §55.

The Union, however, argues that there is no evidence that this answer came from Fanning's lips. The Board argues that, assuming the answer did not come from Fanning but from another union agent in the group, Fanning's silence at that moment must be taken as acquiescence; that the spokesman spoke for all and that in these circumstances Fanning's acquiescence renders the Union liable for the statements and actions of the Union representatives on its behalf. There is merit in the Board's contention. But, be that as it may, it is sufficient to say that it was in reliance upon the answer of one in the group that Jamuale took the steps which led to Kondracki's removal from the job. If, in

truth, no work stoppage was in progress, it was Fanning's duty so to inform Januale when he questioned the group of union agents. Fanning, the Union's agent, having chosen then to remain silent, the Union cannot now be heard to deny that a work stoppage was in progress.

The Union's next contention is that Kondracki was removed from the job as the result of an independent threat by Teamster representative Raymond F. Ebert to George Silverman, architect of the project, which in no way was communicated to Fanning, or made at Fanning's request or with his knowledge. The Union argues that the record establishes that when Ebert arrived at the job site and saw Kondracki, he told Januale that Kondracki should not be on the job because his union did not have a contract with Kondracki, and that shortly thereafter Silverman arrived in Januale's office and Ebert then told Silverman that as long as Kondracki was on the job he would not supply teamsters on the job, that Silverman went to the telephone and called William Hambly and that it was after Silverman's conversation with William Hambly that Kondracki was removed from the job. The Union argues that this evidence makes it clear that it was Silverman who directed William Hambly to have Kondracki removed following pressure by Ebert, on behalf of the Teamsters' Union. As can be seen, this evidence is in direct conflict with the testimony of Januale who testified that it was he, after receiving the answer from the union agents as to the reason for the work stoppage, who made the telephone call to William Hambly, who had been alerted the preceding evening by Ruppert that Fanning had warned he would have the building trades put up a picket line because Kondracki was non-union. Januale further testified that William Hambly instructed him to order Kondracki to take his man off the bulldozer and to stop the Kondracki operation. It

is undisputed that Silverman was present in Januale's office that morning. He, naturally, as the record amply shows, was very agitated and upset over the work stoppage and the prospect of a cessation of work on the school project at that crucial time. This is not to say that Ebert did not at some time during that morning enter Januale's office. In fact, there was evidence that both Fanning and Anthony A. Giudice, agent for the Bricklayers' Union had entered the office that morning. It was to be expected that there would be a flurry of excitement and movement at that time. However, I find that the credible evidence shows a course of events, a pattern, climaxed by Kondracki's expulsion from the job site, which emanated from the labor dispute which the respondent Union had with Kondracki. Fanning's warning the preceding afternoon led Ruppert to call William Hambly that evening and advise him of their conversation and led Van Leeuwen to alert Joseph Kondracki that there might be trouble the next morning. Neither Ruppert nor Januale referred to Ebert during their testimony, nor does it appear that any threat from Ebert influenced or pressured Januale when the reason for the work stoppage was reported to William Hambly. I find no support in the credible evidence for the Union's claim that Kondracki was removed from the job site because of an independent threat from the Teamsters' Union.

I come then to the final contention of the Union that the record fails to support the Board's charge that the Union induced any neutral employees to stop work or that it threatened, coerced or restrained any neutral person with the object of forcing such person to cease doing business with Knodracki. The Union argues that when Silverman told Fanning that everything was all straightened out it was Fanning's belief that Hambly would see to it that Kondracki would pay area standard wages and, this object

was the only desired purpose for Fanning's presence at the site. Fanning did testify that his only interest in coming to the site was to see that area standards were maintained by Kondracki and that the Union receive fringe benefit payments. However, he did not communicate this concern to William Hambly, Januale or Silverman. Although Fanning testified that during his conversation with Ruppert he mentioned the fact that Hambly was not "living" (Tr. 653) up to the Union contract, he admitted that he did not tell Ruppert that he wanted Kondracki to pay the same wages and the same welfare and pension benefits which other contractors were paying. Moreover, Fanning admitted that since area standards on the Cornwall School job were regulated by the State, Kondracki's wages would necessarily have met these requirements. Fanning further testified that he did not know how the dispute was resolved by Hambly, but that he accepted Silverman's statement that everything was all straightened out without further inquiry and that he did not know that Kondracki had been removed from the job. But it should be observed that Fanning also testified that he had been told that Kondracki "would be finished in a short while, and we left" (Tr. 703). Certainly Fanning's unexpressed desires or inner beliefs can have no weight in view of his expressed warning to Ruppert that the job would be picketed because Kondracki was non-union and that he would enlist the aid of the other building trades, a message which was conveyed to William Hambly. Nor do I see merit in the Union's argument that Fanning had no desire to remove Kondracki from the job as this would not have served any useful purpose. It appears that removal of Kondracki was exactly what Fanning intended by his warning to Ruppert and carried out the following morning by a work stoppage and the notification to Januale that the reason for the work stoppage was because Kondracki's union was not recognized. Moreover,

from Fanning's own testimony the inference to be drawn is that Silverman undertook to "straighten" out the dispute on Fanning's behalf, and when it was "straightened" out, Silverman and Jamuale came out to Fanning and told him so (Tr. 667, 670, 672). That the work stoppage was in effect for only a short length of time did not alter the unfair labor practice or make it less effective, if its object was to force Hambly to cease doing business with Kondracki, within the meaning of section 8(b)(4)(ii)(B). There is no evidence that the Union merely wanted Hambly to use its influence with Kondracki to change Kondracki's attitude. On the contrary, it appears clear that the object was, due to the Union's labor dispute with Kondracki, to terminate Hambly's relationship with Kondracki, an object which it successfully carried out when William Hambly instructed Jamuale to direct Kondracki to stop its operation.

Accordingly, I conclude that the Board amply supported its charge that the Union, in furtherance of its dispute with Kondracki, induced neutral employees to stop working and thereby induced the neutral employer and contractor, Hambly, to cease doing business with Kondracki.

IV

Occurrence at Royal Lubrication Company Construction Site, Hanover, New Jersey

The fourth violation is charged by the Board in its supplemental petition in the following terms:

> "On or about September 24, 1968, the Union through its agent, Frank Bisonic, threatened Nicholas J. Bouras, president of Nicholas J. Bouras, Inc., that the Union would strike the Hanover job site unless Bouras either

required Morin to satisfy the Union's demands or removed Morin from the job."

Upon consideration of the evidence, I make the following

Findings of Fact

1. At the times here material:

(a) Becker Construction Company, hereinafter called Becker, was the prime contractor for the construction of a warehouse for the Royal Lubricant Company at Hanover, New Jersey.

(b) Nicholas J. Bouras, Inc., hereinafter called Bouras, had a subcontract with Becker to furnish and install steel decking on the second floor of the warehouse.

(c) Morin Erection Company, hereinafter called Morin, was a subcontractor of Bouras for the installation of the steel decking at the Royal Lubricant Company job site.

(d) Hermes & Young, Inc., hereinafter called Hermes, furnished a crane, manned by an operator and oiler, to Becker for work at the Royal Lubricant job site.

(e) Becker, Bouras, Morin and Hermes were persons engaged in interstate commerce in the construction industry.

2. On September 23 and 24, 1968 at the Royal Lubricant job site the Union had a labor dispute with Morin regarding the assignment of a Union member to operate Morin's welding machine. During this period, Frank Bisonic, a lead engineer appointed by the Union to work at another jobsite, aced as an agent on behalf of the Union in seeking to resolve the Union's dispute with Morin; the Union knew

that Bisonic assumed authority to settle the dispute and acquiesced in such assumption of authority.

3. On the afternoon of September 23d Bisonic was present at the Royal Lubricating job site and saw that Morin was operating its welding machine without having assigned a Union member thereto. Bisconic, after telling Wilson Morin, foreman for Morin on that job, that a Unign member should be operating the welding machine, called the Union and reported this to Edward Weber, a business agent of the Union. Later that afternoon, Thomas F. Garguilo appeared and reported to Wilson Morin as the Union member dispatched by the Union to operate Morin's welding machine, but Wilson Morin did not assign Garguilo to Morin's machine.

4. The following morning, September 24th, about 7:50 A.M. Garguilo reported again to Morin but Wilson Morin refused his services. Garguilo called the Union and left a message for Weber that he, Garguilo, was having trouble with Morin. Shortly thereafter, Bisonic appeared at the job site and told Wilson Morin he would have to put a man on the welding machine.

5. Following Wilson Morin's refusal to assign Garguilo to Morin's welding machine, Bisonic about 8:30 A.M. entered the office of Edward R. Bolton, job superintendent for Becker, informing Bolton that Becker's agreement with the Union was violated because a welding machine was being operated without the services of a Union member.

6. Bolton called Harold A. Bishof, general superintendent for Becker, who told Bolton he would come to the job site and who at the same time instructed Bolton to notify Bouras, Becker's subcontractor for the installation of steel. Bishof further instructed Bolton to propose to Bisonic that

Becker place on its payroll the engineer assigned by the Union to man Morin's welding machine until the matter could be adjusted which offer Bisonic immediately rejected.

7. In compliance with Bishof's instructions, Bolton called Nicholas J. Bouras, president of Bouras' informing him of the Union dispute with Bouras' subcontractor, Morin. Charles E. James was directed by Bouras to visit the job site for investigation and report. When Bolton called Nicholas Bouras, the telephone was handed to Bisonic who then spoke to Nicholas Bouras. About one-half hour later Bisonic telephoned Nicholas Bouras and told him, inter alia, that he wanted Bouras to cancel its contract with Morin. James arrived at 10 A.M. and Bolton, Bisonic and James awaited Bishof's arrival, but Bisonic left the job site about 10:30 A.M., about one hour before Bishof arrived.

8. On that morning, September 24th, a crane had worked with Becker's ironworkers completing the unloading of steel beams from trailers, an unloading job which had been started the preceding day. The crew of the crane was then directed to move the crane to another location for the unloading of steel sheaths from a railroad car. As the crane was proceeding in front of the construction office at about 11 A.M., it stopped. The crew left the crane. Becker's ironworkers stood around for about 20 minutes and then they were assigned to other work.

9. The services of the crane, including the services of the crew, had been rented by Becker from Hermes. The crew operator, Richard B. Young, and the oiler, Alfred B. Huff, were employees of Hermes and members of the respondent Union.

10. Bishof arrived at the job site about 11:30 A.M. and told James, Bouras' representative, that Bouras would be

held responsible for any loss of time with which the job would be penalized.

11. James Boyle, assistant business agent of the Ironworkers' Union, Local 11, arrived at the job site office. Bisonic telephoned Bishof at the job site office about noon. Bishof inquired of Bisonic whether it was necessary for there to be a work stoppage if Bishof stopped Morin from doing any work until Morin satisfied Becker and the Union in respect to the labor dispute. Bisonic replied that the crane could work with Becker's ironworkers if Bishof saw to it that Morin did not continue to work. Boyle then spoke to Bisonic over the telephone, assuring Bisonic that Bishof's word was "good" (Tr. 1077).

12. Bishof instructed Bolton not to permit Morin to continue to work in the afternoon until the dispute was settled. Bolton told Wilson Morin he would have to stop so that Becker's workmen could continue. The crane resumed its work at 12:30 P.M. Morin was at the job site but did not work.

13. The Union caused the operator and oiler of the crane, employees of Hermes—a neutral employer, to refuse in the course of their employment to perform services thus causing a work stoppage with the object of forcing neutral employers and contractors to cease doing business with Morin, the primary employer.

14. Garguilo was informed by the Union to report to Morin for work, which he did at approximately 1:30 to 1:45 P.M. on September 24th. Morin, under protest, then assigned Garguilo to its welding machine.

Discussion

The Board contends that the evidence supports the charge that the Union caused a work stoppage of neutral

employees at the Royal Lubricant job site to pressure neutral employers to stop doing business with Morin. This the Union denies on several grounds. First, it argues that Bisonic was not its agent and that he had no authority to act on its behalf. I find no merit in this contention. The record amply supports the Board's contention that Bisonic was here acting as an agent on behalf of the Union with the knowledge and acquiescence of Edward Weber, a business agent for the Union. At the time of this occurrence, Bisonic had been appointed to act as a lead engineer at a job site located in Parsippany, New Jersey. Although he was not employed at the Royal Lubricant job site, he was there on the afternoon of September 23, 1968. At that time, he checked the Union books of Hermes' crew operating the crane. He then saw that Morin was operating its welding machine. He introduced himself to Wilson Morin, foreman for Morin, as a representative of the respondent Union, and asked him "Aren't you aware that you are supposed to have an Engineer covering this welder" (Tr. 958). Bisonic then told Wilson Morin that he would "call up an Engineer to cover the welder" (Tr. 959). Bisonic testified that after he left that job site, he returned to his place of employment and called Simeon Morin in Connecticut on the telephone; that Simeon Morin offered to pay the health and welfare benefits of a sick member; that Bisonic then called the Union and spoke to Weber, telling him of the violation at the Royal Lubricant job site and transmitted Morin's offer which Weber rejected. Bisonic called Simeon Morin again on the telephone informing him of the Union's rejection of the offer. Later that afternoon Thomas Garguilo, a member of the Union, appeared at the job site and told Morin he was there "to cover the welding machine" (Tr. 960) but Wilson Morin ignored him. Bisonic was the only person apparently representing the Union to appear at the job site

on September 23d. The evidence shows that he worked closely with Weber, advising Weber of Morin's proposal in settlement of the labor dispute with the Union and conveying back to Simeon Morin the Union's rejection of his offer. On the following day, as will be seen, Bisonic was the only person who spoke to representatives of the neutral employers and contractors. While the Union admits that Bisonic had conversations with the representatives of various employers, it contends that there is no evidence that the Union either requested Bisonic to act on its behalf or that it ratified anything that Bisonic may have done. However, section 2(13) of the Act provides that in "determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C.A. §152(13). Accordingly, I find from all the circumstances here, including Bisonic's conduct at the job site and the Union's acquiescence therein, that Bisonic was acting within the scope of his apparent authority in negotiating the Morin labor dispute on behalf of the Union.

The Union next denies that there was a labor dispute with Morin on this particular job. That the Union has had a long standing labor dispute with Morin in regard to the assignment of Union members to Morin's welding machines is part of the record in these proceedings and was an admitted fact in the South Bound Brook occurrence of August 1966. That this labor dispute continued here is also equally clear. The basis for Bisonic's action was that the operation of a welding machine without a Union member was a violation of the agreement with Becker, the terms of which, Bisonic claimed, applied as well to Bouras and to Morin. The Union was well aware of this labor dispute and sought to resolve it by dispatching Thomas Garguilo

to the job site to operate Morin's machine on September 23d. Accordingly, I find no merit in the contention of the Union that there was no labor dispute at the Royal Lubricating job site.

The Union's next contention is that there was no work stoppage. I cannot agree. It appears clear to me from the evidence that Bisonic communicated to Bolton his intent that, since Morin was adamant in rejecting the Union member dispatched to operate the welding machine, a work stoppage would occur unless Morin was put off the job. The morning of September 24th Garguilo reported again to Morin to work the welding machine but he was told, "There is no work for you today" (Tr. 992). About 8 A.M. Garguilo called the Union hall, he asked for Weber and left a message: he "was having trouble with the Morin Company and that they should get in contact with him [Weber] and see if he could come onto the job site" (Tr. 993). Bisonic appeared at the job site and told Wilson Morin that he would have to employ a Union member to operate the welding machine or "nobody works" (Tr.960-961). Upon Morin's refusal, Bisonic went to the construction office about 8:30 A.M. and spoke to Edward R. Bolton, Becker's superintendent. Bolton testified that Bisonic's conversation, in pertinent part, was as follows: "And he said' 'We have a violation of the agreement on your job.' And he said that he wanted my assistance to clear this violation up. So he wanted Morin off the job. So I immediately called my boss and gave the information to him . . . Well, he said to me, 'Don't forget, now, you are operating a crane here on this job, and with this violation going on,' I mean this was the gist of his conversation. . . . Well, he said that whenever you use a welding machine to do any welding on a job, you must have a hoisting engineer to operate the machine. . . He said that

Morin was in violation because he was running a welding machine without an engineer . . . he said we can't work when there is a violation on the job" (Tr. 827, 830).

In Bisonic's presence, Bolton immediately called Harry Bishof, general superintendent for Becker, who instructed Bolton to advise Bouras, Becker's subcontractor for the steel installation. Bolton testified that Bishof further instructed him to make an offer to Bisonic that, until the dispute was resolved, Becker would place on its payroll the Union member assigned by the Union to Morin's welding machine but Bisonic refused, saying, "no, if this man goes on the payroll, he has to go on Morin's payroll" (Tr. 842). About 9 A.M. Bolton telephoned Nicholas J. Bouras, president of Bouras, informing him of the labor dispute on the job site with Morin concerning the use of an operator on Morin's welding machine. Bolton at that time turned the telephone over to Bisonic who then spoke to Nicholas Bouras. About thirty minutes later Bisonic telephoned Nicholas Bouras and spoke to hime again. With respect to this conversation, Nicholas Bouras testified as follows: ". . . Mr. Bisonic told me if something isn't done about this, well, I believe he said that there would have to be a work stoppage. Also, he did tell me, well, he did want me to cancel my contract with Morin if Morin wouldn't put this Operating Engineer on the job. And I told him I wouldn't do it and it was up to Morin to straighten out the situation with the union" (Tr. 940).

Charles E. James had been directed by Bouras to investigate the matter and report to Bouras. He testified that he met Bolton and Bisonic at the construction office about 10 A.M. and that Bisonic told him to call Morin "off of the job"; that he told Bisonic he "had no authority whatsoever to call off Morin from doing any further work

on the job" (Tr. 979). Bisonic, James and Bolton awaited Bishof's arrival, but Bisonic left about 10:30 A.M. saying he had an engagement. About one-half hour after Bisonic left, a work stoppage occurred under the following circumstances:

On September 24th Becker's ironworkers had continued early that morning the work they had started the previous day, that is, unloading steel columns from two trailer trucks with the aid of a crane which Becker had rented from Hermes. The services of the rented crane included the services of its crew, an operator, Richard B. Young, and an oiler, Alfred B. Huff. The members of this crew were employees of Hermes. No useful purpose would be served in repeating the legal principles discussed earlier in this report (pp. 10 et seq.), governing the status of employees upon rental of the services of a crane including the services of the crew. It is sufficient here to say that, although the crew were directed where to work and told what work had to be done, they remained employees of Hermes. The job of unloading the steel columns was completed and Herb Banghard, Becker's foreman in charge of directing the crane, instructed the crew to move the crane for the purpose of unloading steel sheaths from a railroad car. It appears that it was the duty of the oiler, Huff, to move or drive the crane and it was the duty of Young to operate it. As Huff was moving the crane to another location, he stopped in front of Bolton's office, about 400 to 500 feet from the place to which he had been directed. This occurred about 11 A.M. The crew left the crane. Becker's ironworkers, who had been working with the crane, stood around for about twenty minutes; then they were ordered to manually unload window frames from a trailer truck.

When Bolton saw the crane stop, he asked Young what was the problem. Bolton testified that " . . . [Young] said,

'My oiler won't move until this violation'—or 'My oiler don't want to work with this violation.' I don't remember the exact words. But he indicated to me that because of this union violation we had on the job his oiler wouldn't work under those conditions. So the crane stayed there" (Tr. 834). Young denied making this remark to Bolton, stating that he stopped work when the oiler, Huff, told him' "That's all for the crane" (Tr. 1070). And the oiler testified that he heard someone tell him to stop the crane, that he believed it to be an order from one of the ironworkers so he advised the operator and then the operator stopped working until 12:30 P.M. The Union strongly argues that there is no evidence that Bisonic induced or requested the members of the crew to engage in a work stoppage but that the evidence shows that the crew stopped working as a result of an order from one of the ironworkers to the oiler. It is true that Bisonic left the job site about 10:30 A.M., one-half hour before the work stoppage. Bishof arrived about 11:30 A.M. and received the information from Bolton in respect to the problem. Bishof told Bouras' representative that Bouras "was responsible for whatever loss of time or anything else that the job was going to be penalized" (Tr. 918). There were various telephone calls and about noon James Boyle, the Ironworkers' Union representative, came into the office. Before Bishof could speak to Boyle, however, Bisonic called on the telephone. As to this conversation, Bishof testified as follows: ". . . the telephone rang and it was a Mr. Bisonic, and it was the first time I ever spoke to the gentleman. . . . I asked him if it was necessary for my men to lose time as far as the crane and the Ironworkers, if I stopped Morin from progressing or doing any work on the job until he satisfied Becker and the local union of whatever the trouble was on the job . . . He said if I saw to it that he didn't

continue to work, that it would be O.K. for our operator" (Tr. 918, 919). Bishof then asked Boyle to speak to Bisonic and Boyle said, " 'If Bishof says that way, I know him long enough to keep his word, that he won't let the man do any work until this thing is squared away,' and with that, we had the O.K. to go ahead" (Tr. 920). Bishof further testified that the man they were talking about Morin and that he instructed Bolton "not to let Morin continue working in the afternoon until this thing was settled" (Tr. 920). thus, although Bisonic had left before the work stoppage started, he did not disavow to Bishof that a work stoppage was in progress and, in fact, settled the dispute during the telephone conversation by agreeing that the crane would work with the ironworkers if Morin was stopped from doing any work until such time as Morin complied with the Union's demands. Accordingly, while there is no direct evidence that Bisonic, or anyone else on behalf of the Union, requested the crew to engage in a work stoppage, the inferences I draw from the circumstances surrounding Bisonic's conduct at the job site on September 24th and from his conversations with Becker's and Bouras' representatives, and with Boyle, are that Bisonic knew of the work stoppage and that the crew were induced to engage in the work stoppage by the Union with object of coercing neutral employers to cease doing business with Morin until such time as Morin would comply with the Union's demands and assign a Union member to operate the welding machine. The Union also contends that this was not actually a work stoppage since the normal lunch hour would have been from 11:30 A.M. to noon, and this stoppage from 11 A.M. to 12:30 P.M. was not in actual time much longer than a lunch period. I am not convinced that it is the length of time which determines whether or not neutral employees engaged in a work stoppage. It appears

to me that it is the circumstances which prompted the work stoppage that are important. The evidence that a work stoppage did occur at 11 A.M., together with the threats of a work stoppage of Hermes' employees and the actual work stoppage causing Becker's ironworkers to be unable to continue unloading the steel sheaths from the railroad car, and the eventual settlement of the dispute through Bisonic, which required Morin to be kept off the job, satisfies me that the Board has established the Union's responsibility for the work stoppage and its object. I cannot find that the evidence establishes the Union's contention that Bisonic desired the general contractor and Bouras to use their influence upon Morin to employ a Union member to operate the welding machine.

I come then to the final question—whether the Union's objective of having Morin removed from the job until such time as it would comply with the Union's demands exemplified the type of conduct proscribed in section 8(b) (4) (ii) (B), that is, did the neutral employers and contractors "cease doing business" with Morin. The Supreme Court observed in *Labor Board v. Rice Milling Co.*, 1951, 341 U.S. 665, 673, footnote 7, that "The character of the problem of reconcilation of the right to strike with the limitations expressed in § 8(b) (4) is not unlike that which confronted the Court in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797,806: 'The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.' " It appears to me that Congress used a word not difficult of defi-

nition nor vague. If the word "cease" is defined to mean to some to and end—to stop—then one "ceases" doing a thing when he discontinues its performance. Since the conduct of the Union must be analyzed in terms of all the surrounding circumstances to see whether it constitutes the proscribed secondary activity, it seems to me clear from the evidence that the Union here exerted its economic pressure upon neutral employers and contractors with an object of having Morin removed from the job. And Morin was removed from the job and told not to work that afternoon or until it settled its dispute. Certainly that was a cessation of the business relation of the primary employer with the neutral employers, who became enmeshed in a labor dispute in which they had no direct interest. It's resumption was entirely up to Morin if it decided, as it later did, to meet the Union's demands. Accordingly, I find, from the evidence, that the Union caused a work stoppage of neutral employees at the Royal Lubricant job site with the object of causing neutral employers and contractors to cease doing business with Morin.

The Decrees of October 22, 1963 and August 5, 1966.

1. On October 22, 1963, this Court rendered its decree in No. 14218 enforcing an order of the Board issued on August 27, 1962, and in its decree this Court ordered:

> " . . . that Respondents, Local 825, International Union of Operating Engineers, AFL-CIO, its agents, officers, representatives, successors, and assigns, and Respondents Peter Weber, William Duffy, and John Pierson abide by and perform the directions of the Board in said order contained." [*N.L.R.B. v. Local* 825, *International Union of Operating Engineers*, 3 Cir. 1963, 322 F.2d 478.]

In pertinent part, the order of the Board, as enforced by said decree, provides [138 NLRB 279, 281]:

"Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Local 825, International Union of Operating Engineers, AFL-CIO, its officers, agents, representatives, successors, and assigns, and Respondents Peter Weber, William Duffy, and John Pierson, shall:

"1. Cease and desist from

Engaging in, or inducing or encouraging any individual employed by Lettieri and Bellezza Company, Gates Construction Company, United Engineers & Constructors, Inc. or any other employer, to engage in a Strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or theatening, restraining, or coercing Lettieri and Bellezza Company, Gates Construction Company, United Engineers & Constructors, Inc., Public Service Electric & Gas Company, or any other employer, where, in either case, an object thereof is to force or require: (1) Lettieri and Bellezza Company or any other employer or person to cease doing business with W. A. Chester, Inc., or with any other employer or person; (2) Gates Construction Company or any other employer or person to cease doing business with Utility Service Corp. or with any other employer or person; (3) United Engineers & Constructors, Inc., or any other employer or person, to cease doing business with Public Service Electric & Gas Company or any other persons in order to force or require Public

Service Electric & Gas Company or any other person to cease doing business with W. A. Chester, Inc., Gates Construction Company, or with any other employer or person; or (4) United Engineers & Constructors, Inc., or any other person to cease doing business with Public Service Electric & Gas Company or any other person in order to force Public Service Electric & Gas Company or any other person to force Gates Construction Company or any other person to cease doing business with Utility Service Corp. or with any other employer or person."

On August 5, 1966 this Court entered its decree in No. 15,928 which provided:

". . . it is hereby

"Ordered, Adjudged and Decreed that the Respondent Union and Respondent Weber and all its other officers, representatives, and agents, shall:

1. Cease and desist from:

. . .

" (e) Engaging in, or inducing or encouraging employees of the Gaskill Company, Linde-Griffith Company, or Long Excavating Company or any other employer, to engage in a strike, or threatening, coercing, or restraining any employer-member of the said Association [Building Contractors Association of New Jersey] by a strike, where in either case an object thereof is to force or require any employer-member of the Association, or any other employer, to cease doing business with any other person.

. . ."

Conclusions of Law

The Conclusions which I have reached may be stated as follows:

1. The respondent Union induced and encouraged individuals employed by United Crane & Shovel Service Company (United), Allan Brothers & O'Hara (O'Hara), and other persons at the South Bound Brook construction site, South Bound Brook, New Jersey, to refuse to work for their employers and threatened, coerced and restrained United, O'Hara, and such other employers with an object of forcing United and O'Hara, through Volunteer Structures Company, to cease doing business with Morin Erection Company in violation of Section 8(b)(4)(i) and (ii)(B) of the Labor-Management Relations Act, 29 U.S.C.A. §158-(b)(4)(i) and (ii)(B), and the decrees of this Court.

2. The respondent Union induced and encouraged an individual employed by Petillo Brothers to refuse to work for his employer at the Essex County Courthouse construction site, Newark, New Jersey, and threatened, coerced and restrained Petillo Brothers with an object of forcing Petillo Brothers to cease doing business with S. S. Silberblatt, Inc., in violation of Section 8(b)(4)(i) and (ii)(B) of the Act and the decrees of this Court.

3. The respondent Union induced and encouraged individuals employed by Hambly Construction Co., Inc. (Hambly), and other persons at the Cornwall Elementary School construction site, Cornwall, New York, to stop working for their employers and threatened and coerced and restrained Hambly and such other employers with an object of forcing Hambly to cease doing business with Joseph R. Kondracki & Sons, Inc., in violation of Section 8(b)(4)(i) and (ii)(B) of the Act and the decrees of this Court.

4. The Union induced and encouraged individuals employed by Hermes & Young, Inc. (Hermes) to stop work at the Royal Lubricant Company construction site, Hanover, New Jersey, and threatened, restrained and coerced Becker Construction Company (Becker), Hermes, and Nicholas J. Bouras, Inc. (Bouras) with an object of forcing Hermes, and Bouras through Becker, to cease doing business with Morin Erection Company in violation of Section 8(b)(4)-(i) and (ii)(B) of the Act and the decrees of this Court.

5. By engaging in such conduct, the respondent Union was and is in civil contempt of the decrees of this Court dated October 22, 1963 and August 5, 1966.

THE REMEDY

The Board proposes that the remedy include the following: (1) reimbursement to the Board for all expenses in prosecuting the contempt action, including attorney's fees; (2) the posting of an appropriate notice stating that the Union has been adjudicated in contempt of the Court's decrees and shall hereafter comply with said decrees and Section 8(b)(4); (3) the distribution of such a notice to all employers with whom the Union has a signed agreement and to all the members of the Union; (4) the reading of such notice by an official of the Union before a general meeting of members called for this purpose both in Newark, New Jersey, and in Newburg, New York; (5) the levy of a compliance fine of $10,000 for each future violation of the decrees of this Court and $1,000 per day for each day that such a violation continues; and (6) that upon the failure of the Union to purge itself of civil contempt, the Court issue attachment against the Union and any Union officer or agent responsible therefor. The Union opposes some of these requests.

First, the Union argues that the payment of counsel fees in this case is not warranted. I do not agree. The Supreme Court in *McComb v. Jacksonville Paper Co.*, 1949, 336 U.S. 187, 191-193, stated: "Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specific provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge. . . . The private or public rights that the decree sought to protect are an important measure of the remedy." In *Gompers v. Buck Stove & Range Co.*, 1911, 221 U.S. 418, 441, 443-445, in which case the Supreme Court said that if the proceeding "is for civil contempt the punishment is remedial, and for the benefit of the complainant . . . the alleged contempt did not consist in defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. . . . Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause." And in *United States v. United Mine Workers of America*, 1947, 330 U.S. 258, 303-304, the Court said: "Judicial sanctions in civil contempt proceedings may, in a proper case, be

employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. . . . Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy." It is also well established that the presence of the United States as a party, acting through its agents, does not impress upon the controversy the elements of a criminal proceeding *McCrone v. United States*, 1939, 307 U.S. 61, 64. The decree is binding upon the respondent, not only in the district where issued but throughout the United States. *Leman v. Krentler-Arnold Hinge Last Co.*, 1932, 284 U.S. 448, 454. This Court in *N.L.R.B. v. Star Metal Mfg. Co.*, 1951, 187 F.2d 856, 857, directed the respondents to pay to the National Labor Relations Board the sum of $757.86 which represented expenses necessarily incurred by the Board in connection with the prosecution of the petition in civil contempt, including counsel fees and other expenditures, incurred in the investigation, preparation, presentation and final disposition of the petition.

Accordingly, I conclude that by reason of the contumacious conduct of the Union, this Court should impose upon the respondent Union the remedial punishment of a fine payable to the Board in an amount adequate to compensate it for the court costs and all expenses it incurred in these proceedings, including salaries in investigating, preparing and presenting the matters involved, the amount of such compensation to be determined upon proof submitted by the Board when these proceedings are finally concluded.

The Union next raises an objection to the form of notice proposed by the Board. While it concedes that the posting

of a notice at Union headquarters for a reasonable period would be appropriate, it contends that reading such a notice by an official of the Union before a general meeting of members called for this purpose both in Newark and in Newburgh is unnecessary, humiliating and degrading. The Union also argues that the mailing of such notices to all its members and to the employers with whom it has contracts would be punitive. The Board suggests this procedure as an effective way by which to obtain compliance by means of widesperad publicity and notification of the Union's unlawful activities. I agree that such notification would be appropriate under the circumstances of this case. Compare *National Labor Relations Bd. v. Weirton Steel Co.*, 3 Cir. 1950, 183 F.2d 584, 586, in which the respondents were directed to purge themselves of the contempt by, inter alia, distributing notices to all employees individually and publishing in a certain publication that the respondents had been adjudged in contempt.

And, finally, the Union, conceding that in civil contempt proceedings a compliance fine is perfectly proper and that most courts, including this court, do provide such a remedy, contends that the order to be entered should only impose a specific compliance fine with a further sum for each day of noncompliance but not a compliance fine for each future violation. The Union argues that the imposition of such a fine would set a punishment for a future violation regardless of the nature of the future violation. I do not agree. The decrees of this Court were aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance was not forthcoming that objectives was frustrated. The judicial remedy of contempt is to secure compliance. This Court should impose whatever sanctions are necessary under the circumstances to grant full remedial relief and to coerce the Union into compliance with this Court's decrees.

RECOMMENDED ORDER

Accordingly, the following order is recommended:

It is ORDERED and ADJUDGED that the respondent, Local 825, International Union of Operating Engineers, AFL-CIO, is in civil contempt for having violated the Court's decrees entered October 22, 1963 and August 5, 1966, and

It is FURTHER ORDERED that the respondent Union, by its officers and agents, shall purge itself by:

(1) Forthwith complying in full with each and every provision of the Court's decrees of October 22, 1963 and August 5, 1966.

(2) Immediately posting in conspicuous places, in its business offices, meeting halls, and all places where notices to its members are customarily posted, for a period of sixty days, copies of the contempt adjudication and of an appropriate notice, signed by an appropriate officer on behalf of Local 825, International Union of Operating Engineers, AFL-CIO, stating that the respondent Union has been adjudicated in civil contempt of this Court for violating and disobeying the Court's decrees of October 22, 1963 and August 5, 1966 and that it will hereafter comply with the said decrees and with Section 8(b)(4)(i) and (ii) (B) of the Labor-Management Relations Act, 158 U.S.C.A. §158 (b)(4)(i) and (ii) (B), such notices together with a copy of the contempt adjudication to be maintained in clearly legible condition throughout such posting period, and insuring that such notices are not altered, defaced or covered by any other material.

(3) Immediately signing and mailing copies of said notice to all employers with whom the respondent Union has a signed agreement.

(4) Immediately signing and mailing copies of said notice to all members of the respondent Union.

(5) Immediately reading said notice by an officer of the respondent Union before a general meeting of members called for this purpose both in Newark, New Jersey, and in Newburgh, New York.

(6) Filing a sworn statement with the Clerk of this Court and copies thereof with the Regional Director for the Twenty-second Region, Newark, New Jersey, and separately notifying said Regional Director in writing, within thirty days after the entry of this order of adjudication, showing what steps have been taken by the respondent Union to comply with the Court's directions.

(7) Paying to the Board an amount adequate to compensate the Board for its costs and expenses including salaries in investigating, preparing and presenting the matters involved in these proceedings, the amount of such compensation to be determined upon proof submitted by the Board when these proceedings are finally concluded.

(8) Paying the costs of these proceedings in this Court, including the cost of printing the Special Master's report.

In order to insure compliance with the foregoing provisions,

It is FURTHER ORDERED that upon the failure of the respondent Union to purge itself of contempt as herein provided, this Court will deal further with the matter by imposing a compliance fine of $10,000 on the respondent Union for each future violation of the decrees of the Court and a further compliance fine of $1,000 per day for each day that such a violation continues, and by such other means as the Court shall determine, including the issuance

of attachment against the respondent Union and any Union officer or agent responsible therefor.

The foregoing report is respectfully submitted.

ALBERT B. MARIS,
Special Master

Philadelphia, Pa.
December 2, 1969

APPENDIX C

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this

clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

• • •